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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 618

CLIFFORD GOWDY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Clifford Gowdy, hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit reversing a tort judgment by the district court for the petitioner in the sum of $289,242.82.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is as yet unreported.

A copy of the opinion is printed in the Appendix to this Petition.

The opinion of the Federal District Court is reported in 271 F. Supp. 733 (1967). A copy of the opinion is also printed in the Appendix to this Petition.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was filed on June 20, 1969 and judgment entered by the District Court on August 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. par. 1254 (1).

QUESTIONS PRESENTED

I.

Under the common law of Michigan, a principal employing a contractor can be liable for injury to the employee of the contractor if the principal does not take reasonable precautions for that employee's safety, if:

1. The work being performed is inherently hazardous;
2. The principal provides an unsafe site;
3. The principal exercises any control;
4. The principal provides machinery.

Did not the Circuit Court of Appeals erroneously ignore the wording of U.S.C. par. 1346 (b) and the interpretation

given it in *Hess, Rayonier* and *Indian Towing* and give undue weight to *Dalehite* when it reversed a judgment of $289,249.82 under the Federal Tort Claims Act based upon District Court findings that:

1. Petitioner was severely injured in navigable waters of Michigan while performing work as an employee of a contractor hired by the federal government;
2. The work petitioner was engaged in was inherently hazardous work;
3. Government employees were negligent in:
   A. Providing an unguarded davit (a maritime boom);
   B. Allowing work to proceed from the second deck of a lighthouse when they knew that such work would occur in an area in which the Government had failed to replace guard rails which had been discarded and failed to provide for their replacement in the construction contract;
   C. Controlling the work in such a way as to multiply the risk of injury to the petitioner tenfold;
4. Each negligent act was a proximate cause of petitioner's injury;
5. The petitioner was guilty of no contributory negligence; and
6. A private person would be liable under the applicable law.

II.

Did not the Circuit Court of Appeals misconstrue its right of review under Rule 52 (a) of the Federal Rules of Civil Procedure in finding "a mistake has been made and the finding of the District Court is clearly erroneous" when to do so it had to:

1. Reverse the District Court's finding, without citing a Michigan case, that Michigan law followed the Restatement of Torts rule that in determining negligence the superior knowledge of an actor is relevant;

2. Reject the testimony of the retired Chief of Safety of the U. S. Army Corps of Engineers that the danger to petitioner was a subtle one, after the competence and credibility of the witness was accepted by the trial court and there was no contrary testimony;

3. Reject the testimony of the Safety Engineer of the U. S. Coast Guard that the only way in which the petitioner could have been protected was by guard rails, after the competence and credibility of the witness was accepted by the trial court and there was no contrary testimony;

4. Reject the trial court's finding that the petitioner was not contributorily negligent even though petitioner's foreman, superintendent and the Coast Guard station safety officer, rigging crew and oiler had all worked approximately where the petitioner had and had failed to recognize that the combination of hazard and risk had reached the dangerous point and that the only proper protection for them when adjacent to the davit, was a guard rail;

5. Reject the trial court's finding that the Government had authorized the use of the roof area where petitioner was working when this was judicially admitted by the Government and there was no contrary testimony;

6. Reject the trial court's finding that the davit was unguarded when this was judicially admitted by the Government and there was no contrary testimony;

7. Refuse to follow the trial court's finding that Michigan law is identical with Section 343 and 343A of the Restatement of Torts, but without citing a single Michigan decision contrary;

8. Reject the trial court's findings that the defendant had unreasonably increased the danger to petitioner by requiring tenfold performance of the task petitioner was engaged in, when there was no contrary evidence;

9. Refuse to follow the trial court's finding that the defendant had failed to meet its burden of proof on contributory negligence under Michigan law which allows a worker to rely on directions and assurances of his superiors;

10. Reject the first premise of the field of safety engineering which is that the determination of the point at which there is a dangerous combination of hazard and risk is sophisticated, and in that rejection, make findings of fact which are unscientific.

III.

When an injury occurs at a lighthouse in Lake Michigan and the said lighthouse is used solely as a navigational aid, is not that tortious injury to a worker a maritime tort when it occurs in the use of a maritime davit from the second deck of the lighthouse?

STATUTE INVOLVED

The Federal Tort Claims Act provides a remedy on claims against the United States for:

> ". . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. par. 1346(b).

COURT RULE INVOLVED

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

Rule 52(a) Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioner was awarded a judgment of $289,248.82 by the District Court in an action for personal injuries brought under the authority of the Federal Tort Claims Act, 28 U.S.C. paragraphs 1346 (b) and 2671. The Circuit Court of Appeals reversed and the complaint was dismissed.

1. The Site and Accident Facts

The United States contracted with Whittaker Electric Company to completely replace and renew the foghorn and light and other existing equipment at the south breakwater lighthouse in Muskegon, Michigan (D. Ex. 5 and P. Ex. 1 and D. Ex. 1).

The lighthouse is located at the extreme end of the south breakwater guarding the channel from Lake Michigan into Muskegon Lake. The breakwater runs from the east shore of Lake Michigan near Muskegon in a generally westward direction for a distance of approximately a thousand feet. It consists of concrete and stone, and is supported by piles sunk into the lake bottom.

Constructed of heavy gauge steel, the lighthouse rests on an elevated foundation which rises about three feet above the breakwater. It has a single room called the "machinery room" (approximately eight by ten feet) which houses electrical generators and machinery.

Projecting up from the roof of the machinery room is an enclosed tower on which the foghorn and light are mounted. The only means of reaching the top of the tower is a ladder running from the floor of the machinery room to an opening in the roof, through the enclosed tower to the top.

Since the base of the tower is not large enough to cover the entire roof of the machinery room, it is possible for one to stand and walk on a working platform on the east side of the roof in a rectangular area four by eight feet.

There is a radial davit which rotates three hundred sixty degrees on the northeast edge of the roof of the machinery room. At its base the davit is perpendicular to the roof of the machinery room. From its base the davit projects straight up above the roof to a height of about six feet, and then begins gradually to curve away from the perpendicular line of its base to a height of about ten to twelve feet (R 520-522).

There is a circular ring at the upper end of the davit called an eye, to which lines, tackles, and hoists may be attached. The davit is made of heavy gauge steel, and is fitted into a socket in the roof of the machinery room. The davit is completely exposed to the elements, so that because of rust, it is necessary to use a heavy 24-inch or larger pipewrench to turn or rotate the davit (C. Smith deposition, p. 21).

Whittaker Electric Company's employees began work on the lighthouse about August 1, 1963 (R 472). The crew performing the work consisted of a superintendent, Fred Curow; a foreman, Charles Smith, who was also a journeyman electrician; and petitioner, a second journeyman electrician.

Petitioner, in addition to helping remove, repair and replace machinery and electrical equipment in the lighthouse, also assisted in the removal and replacement of the steel door of the machinery room at the beginning and end of each working day. The door was removed and replaced through the use of a chain hoist which was connected by a Whittaker employee to the davit on the edge of the roof

of the lighthouse. This procedure was used primarily to facilitate the removal of old equipment and the installation of new equipment in the machinery room.

James Gilligan, Coast Guard Chief in charge of the Muskegon station, testified that in obedience to Coast Guard regulations, he required Whittaker employees to replace and lock the door to the machinery room at the end of each working day. He admitted he told Frederick W. Curow, administrative supervisory employee of Whittaker, that the davit would be in good working order if he decided to use it (R 55). Gilligan also stated that he attempted to visit the site daily and was aware that the davit was being used, although he could not recall the kind of device being used on it. He estimated that during the course of their work on the lighthouse the employees of Whittaker probably removed and replaced the door at least eight to ten times (R 372). The defendant's employees worked adjacent to the unguarded davit on the second deck (R 360-364).

On August 23, 1963, the Whittaker Electric Company crew, consisting of the foreman and petitioner, arrived at the lighthouse by boat, as they had done previously for about three weeks.

The foreman and petitioner worked on and about the lighthouse until about 4:00 P.M., when they began preparing to suspend operations for the day (R 477).

Petitioner, as he had done eight to ten times before that day, went to the roof of the machinery room by way of a ladder made of rungs about one foot apart on the outside of the machinery room. Petitioner then began operating the ratchet hoist to replace the machinery room door. The ratchet hoist was suspended from the eye of the davit, and attached to the other end of the hoist through a ratchet was a chain which was also attached to the door.

As the hoist was operated, the davit took up slack in order to lift the door; it could also be let-off to lower the door. To operate the lift in this manner, petitioner had to stand about one foot from the edge of the roof, lean forward toward the edge of the roof, and reach over his head with one of his hands to grasp the end of the ratchet hoist handle. The ratchet was about eighteen inches long. Because of his height he was only able to reach approximately three inches of the handle of the ratchet.

While in this position, after having taken up the slack in the chain, and as he was attempting to operate the handle of the ratchet hoist to raise the steel door so that it could be swung into position, and while the door was still resting on its bottom edge, petitioner lost his balance and fell from the top of the roof to the concrete foundation. The petitioner suffered a head injury and has retrograde amnesia as to the facts a few seconds prior to his fall (R 540).

2. Testimony Regarding Standard of Care and Negligence

Safety engineering has acquired a position of a fine art, whereby accident-prone situations are readily ascertainable and reasonably avoidable by the timely application of corrective practices and methods. As a profession it has developed clearly acceptable and well defined standards (R 65-91).

As a leader in the field, the United States Government is in the forefront in advancing safety standards. The United States is among the most knowledgeable in the field of safety engineering (R 107).

Tools of safety engineering are basically: (1) safety standards, safety codes, safety practice sheets, bulletins

and memoranda; (2) safety manuals; (3) statistics; (4) technical journals; (5) safety equipment catalogs; and (6) past accidents (R 66).

There is a continuing President's conference on industrial and construction safety. The Bureau of Labor Standards is one of the prime formulators of safety standards in the United States. The Army Corps of Engineers, the United States Navy, its Bureau of Yards and Docks, the United States Coast Guard, General Services Administration, and practically every unit involved in public buildings, installation, construction, maintenance and repair, have well established, coordinated, and defined safety practices and standards (R 65-91).

Many of these governmental agencies work in close harmony with private organizations, such as the American Society of Safety Engineers, and the National and Local Chapters of the General and Associated Contractors of America. They are all fully aware of the latest safety techniques and procedures (R 65-91).

The Coast Guard in 1963 published General Administration Instruction No. 15-63 or Commandant Instruction 5100.3A, which provides in part that each unit safety officer shall determine that elevated surfaces are properly guarded to prevent falls to persons, insure that personnel are instructed on the importance of placing guardrails around floor and deck openings when covers are removed, inspect permanent guard railings for deterioration and ascertain that safety belts and life lines are used for all hazardous elevated work (R 56).

Paragraphs 1(h), (i), (j) and (k) of enclosure 2 to the Instruction provide that each unit safety officer shall:

"h. Determine that elevated surface areas are properly guarded to prevent falls of persons or falling objects and that stairways, steps, and ladders are in good repair and meet the standards for elevations, height and width of risers, lighting and handrails.

i. Make sure that personnel realize the importance of placing guards around floor and deck openings when covers are removed.

j. Make frequent inspections of floors, decks, stairways, ladders, and permanent guard railings for deterioration which may cause a breakthrough.

k. Ascertain that safety belts and life lines are utilized for all hazardous elevated surface work." (Emphasis supplied.)

Expert testimony established that the hazard was a subtle one, and that the defendant recognized the steps reasonably to be taken (a guard rail) to prevent the hazard causing injuries (R 99, 127, 128).

Some time before August 13, 1963, the second deck of the lighthouse was equipped with guardrails (R 57, 58) which conformed to the standards of construction and safety requirements of the Coast Guard for elevated working platforms. After they had fallen into a state of disrepair, James Gilligan and his superiors failed to repair or replace them. It was not part of petitioner's employer's contract with the Government for his employer to replace the discarded handrails (R 349).

REASONS FOR GRANTING WRIT

This case presents such a flagrant abuse of appellate review under Rule 52 (a) that a per curiam reversal is warranted.

I.

CONSTRUCTION SAFETY—A NATIONAL DISGRACE

FEDERAL IMMUNITY SPEARHEADS UNSAFE NATIONAL POLICY

Twenty-eight hundred (2800) construction workers are killed and two hundred fifty thousand (250,000) disabled annually in the United States.[1] This is a national disgrace and caused primarily because it is presently cheaper for an owner undertaking construction to do it in the unsafe way. It is cheaper because of the immunity granted principals so engaged. Erroneous rulings under the Federal Tort Claims Act have polluted the developing law in such a way as to establish a national policy giving legal license to the killing and maiming of construction workers.

Construction can be performed without injury or death to construction workers.[2] It will not be performed safely until our social architecture, the law, makes it more expensive to do it in the unsafe way. The immunity of the Federal Government was waived by Congress when it adopted the Federal Tort Claims Act. If the courts will implement that policy, thousands of lives will be saved, hundreds of thousands of injuries will be prevented and the new policy will save billions of dollars because safety

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[1] Accident Facts (Annual statistical report of National Safety Council).

[2] Safety Management Manual—Published by the Arizona Building Cont. Association, (1968) Chapter on Management Policy, Part 2, page 1.

pays.[3] The social purpose of the tort law is accident prevention. The conservative way is accident prevention. The trial testimony showed that the Coast Guard, alone among federal agencies, was unwilling to pay for safe performance as part of the bid price.[4]

The opinion by the Court of Appeals in the case at bar is a perfect example of judicial law-making contrary to the will of Congress. It is also a perfect example of an appellate court opining standards of prudent conduct which appear to be "common sense" but which are contrary to everything which has been learned in safety engineering, human factors engineering, ergonomics and biotechnology. The opinion is contrary to the warning of Justice Cardozo in *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 54 S. Ct. 580, speaking for a unanimous court that:

> "Standards of prudent conduct are declared at times by the courts, but they are taken over from the facts of life . . ." at page 582.

In the Twentieth Century with a developed field of safety engineering which recognizes every industrial hazard, every industrial risk, the unsafe combination of hazard and risk and the steps which need to be taken in the exercise of due care to prevent serious injury or death, it ill behooves the judiciary to substitute its untrained Eighteenth Century concepts of a "be careful" safety philosophy for trial testimony from top safety experts. Appellate judges have accepted guidance from medical, scientific and engineering witnesses and recognized it as specialized knowledge and it is now time that the field of safety engineering be recognized as specialized knowledge.

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[3] See Handbook of Heavy Construction, McGraw-Hill (1959), Chapter on Safety by Wendell Blair.

[4] R 239, 240, 249.

A review is invited simply by a comparison between the opinion of the Circuit Court, a travesty, and the District Court's widely hailed opinion, which gives expression to the will of Congress, meets a great social problem, is solidly based upon the evidence and coincides with scientific principles of accident prevention.

II.

APPEALS COURT ERRED IN GIVING UNDUE WEIGHT TO DALEHITE AND IGNORING HESS, RAYONIER AND INDIAN TOWING.

The government in its brief below and the Circuit Court of Appeals placed primary reliance on *Dalehite, et al. v. United States,* 346 U.S. 15, 73 S. Ct. 956, in contending that no duty was owed by the defendant to the petitioner.

The Circuit Court ignored the clarification given *Dalehite* by *Hess v. United States,* 361 U.S. 314, 80 S. Ct. 341; *Rayonier, Inc. v. United States,* 352 U.S. 315, (1957) 77 S. Ct. 374; and *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S. Ct. 122.

The duty of a principal employing a contractor in Michigan to take reasonable precautions for the safety of contractor-employees cannot be delegated if:

(a) The work is inherently hazardous work;

(b) The principal controls the work;

(c) The principal supplies machinery;

(d) The principal provides an unsafe site.

In the case at bar the district court found:

(a) The work was inherently hazardous;

(b) The defendant negligently and unnecessarily required tenfold performance of the task plaintiff was engaged in;

(c) The defendant provided a maritime boom, a machine which is called a davit. (This saved the defendant a substantial sum in the bid price since the work would have required a large boat with a hoist each construction day if the davit were not used.);

(d) The defendant negligently failed to guard the second deck of the lighthouse adjacent to the davit;

(e) The aforesaid acts of negligence were a proximate cause of petitioner's injury and damages.

Rather than posing its decision in these "open sesame" terms, the District Court correctly followed the admonitions of the Michigan Supreme Court and posed the duty as being simply that of due care under the circumstances. In Michigan, a private person would have had to have been found liable when acting as the government. The District Court therefore followed the mandate of 28 U.S.C. 1346 (b) and found the defendant liable.

The first question presented could be formulated in a different way:

DOES NOT THE FEDERAL TORT CLAIMS ACT ALLOW RECOVERY FOR INJURIES TO A CONTRACTOR'S EMPLOYEE FOR THE NEGLIGENT FAILURE OF THE FEDERAL GOVERNMENT AS A PRINCIPAL TO PERFORM NONDELEGABLE DUTIES WHEN A PRIVATE PERSON WOULD BE LIABLE IN THE JURISDICTION IN WHICH THE TORT OCCURRED?

Hess, supra, written by Justice Stewart, reversed a lower court dismissal of a Federal Tort Claim where the plaintiff had contended that the government was liable because it violated nondelegable duties of the Oregon Employers Liability Act during construction of the Bonneville Dam.

The court in *Hess* specifically left it to the District Court to determine whether or not the government had met the standard of care required by the Oregon statute and suggested no limitation to this theory of liability because of *Dalehite.*

There is nothing in the Federal Tort Claims Act that makes any distinction between liability arising from state statute or state common law. A year prior to *Hess,* the Seventh Circuit Court of Appeals had rejected the government's argument that they could not be liable as a principal employing a contractor for violation of the nondelegable duties posed by the Illinois Scaffold Act. In *Schmid v. United States,* 273 F 2d 172 (1959) the court cited *Indian Towing Co., supra,* as standing for the proposition that the test of liability under the Federal Tort Claims Act "is whether there is liability imposed on a private person under the state law" (*Schmid* at 176), and specifically rejected the *Dalehite* "absolute liability" dictum.

There was little or no development in the common law liability of principals employing contractors between 1905 and 1955 because of the workmen's compensation election

statutes. Since the abolition of the election requirement some twenty-five states allow common law recovery for a construction site injury because of negligence of the principal.

The Sixth Circuit had apparently recognized the validity of the theories of liability involved herein, when it affirmed in 235 F. 2d 466 the District Court's judgment in *Pierce v. United States,* 142 F Supp 721.

The reversal in the case at bar, leaves a conflict in the ability of the circuits to follow the statute and Supreme Court decisions and requires an expansion of the *Hess* ruling, to include common law nondelegable duty liability.

III.

APPELLATE REVIEW OF TRIAL COURT'S FINDINGS OF FACT AND STATEMENT OF LAW IS WHAT IS "CLEARLY ERRONEOUS".

Petitioner can think of no better example of the necessity for the requirement in Rule 52 (a) of the Federal Rules of Civil Procedure that a trial court's "findings of fact shall not be set aside unless clearly erroneous."

The trial court had the benefit of the pleadings, the opportunity to determine the credibility of witnesses, the opportunity to determine by personal observation the competence of the expert witnesses. It received the pleadings and the evidence in context. It had hours of legal argument and was most familiar with the law of Michigan.

Since the Court of Appeals found no evidence in two instances where the defendant had admitted a Request for Admission, it presumably did not review the pleadings which were read into evidence. It had only limited and second hand opportunity to determine either credibility or

competence of expert witnesses. It had the benefit of almost no oral argument on the Federal Tort Claim liability, since most of the argument centered on damages and maritime jurisdiction.

To reverse it was necessary for the Circuit Court to state that "there was no proof that the government gave ambiguous or any other kinds of orders or instructions to the contractor," when Judge Fox found the uncontradicted testimony to be that "James Gilligan testified that in obedience to Coast Guard regulations, he required Whittaker employees to replace and lock the door to the machinery room at the end of each working day" and accepted the Coast Guard safety engineer's testimony that this hazard and risk which injured petitioner, could have been removed completely by a temporary door if there was any recognition of safety on the job by the government.

The Government admitted a request for admission that it knew the unguarded roof was being used and this admission was read into the record. The Circuit Court, in its disadvantaged position could not, however, find enough evidence of the Government's knowledge which "would qualify even under the scintilla rule."

To reverse, the Circuit Court had to misstate the Michigan law on "open and obvious" conditions and then find that the dangerous condition was obvious to petitioner so the Government had no duty to use the minimum safeguards which it knew were necessary to protect him in the circumstances.

If it were the trier of the facts, it would have learned from the testimony that the combination of hazard and

risk was a subtle one, that petitioner's foreman, superintendent and the coast guard station safety officer, rigging crew and oiler had all worked approximately where the petitioner had and failed to recognize that the combination of hazard and risk had reached the dangerous point and that the only proper protection for them when adjacent to the davit, was a guardrail.

To reverse, it was necessary for the Circuit Court to find that "the Government was not required to exercise any supervision or control over its independent contractor and is not liable for failure to do so."

If it were familiar with Michigan law, it would have known that a principal undertaking hazardous work through the agency of a contractor has since 1889 had a nondelegable duty to adopt such preventive measures as is necessary because of the nature of the work. It can delegate the work but remains liable for unsafe performance not only on a vicarious theory but on a primary negligence theory. See *Vannoy v. City of Warren, et al.*, 15 Mich. App. 158 (1969), 166 NW 2d 486 and cases cited therein. See also *Johnson v. Spear*, 76 Mich. 139, 42 NW 1092, where a unanimous Michigan Supreme Court declared:

> "If the injuries result from the negligence of the Defendant while work is being done upon his premises, and through his fault in not keeping them in a suitable and safe condition, he is liable to the servants of the contractor for injuries resulting to them from defects therein; not because there is any contract obligation between the parties but arising out of his obligation or duty to provide safe appliances for the servants of the contractor to use and to keep his premises upon which such servants are at work in a reasonably safe condition, whether the contract provides for it or not." (p. 143.)

To reverse, it was necessary for the Circuit Court to state that "the Government furnished no equipment to the contractor", when the only way in which the job could have been done for the contract price was for the Government to furnish a boom for hoisting. Any other method would have required a boat with a crane to proceed to the lighthouse some twenty times. The Government did provide the boom, a davit. Since this was so, it was necessary for the Circuit Court to state that "there is no proof that the davit was defective," when it was admitted that the davit had no guardrail adjacent to it.

The Circuit Court in its confusion attempts to find as a fact that petitioner did not use a choker in the operation of the davit hoist when it was an absolute physical impossibility for the petitioner to come close to reaching the ratchet without a choker and the trial court did not dignify that smokescreen by even commenting upon it in its opinion.

To reverse, it was necessary for the Court of Appeals to ridicule the use of prominent safety engineers in the most sophisticated and avant garde area of safety engineering: risk recognition and risk acceptance.

The trial testimony of one of the leading construction safety engineers in the world, Robert Jenkins, retired Chief of Safety of the U. S. Army Corps of Engineers world wide, that the danger petitioner faced was a subtle one, was backed by his use of the multiple tools of the safety profession including thousands of accident case histories.

It was buttressed by the recognition in every safety standard and code that a guardrail was the only protection against the subtle hazard.

It was rather conclusively supported by the lack of risk recognition by all others similarly involved.

There was not one word of contradictory evidence. The Circuit Court chose to pose it thus:

> "Clearly, the question of whether it was foreseeable for a workman to be distracted and fall is within the competence of an ordinary layman. To warrant the use of expert testimony, the subject of inference must be so distinctly related to some science, profession or occupation as to be beyond the ken of the average layman . . ."

The question posed fairly and correctly has to be:

> Is it Reasonably Foreseeable that Serious Injury or Death May Occur to a Construction Worker in the Performance of a Construction Contract for a Principal Who Undertakes the Work Through the Agency of an Outside Contractor:
>
> (a) When the work is hazardous;
>
> (b) When the site for the work is unsafe;
>
> (c) When the principal multiplies the risk of injury at the unsafe site tenfold by the control it exercises;
>
> (d) When the principal provides an unprotected maritime boom;
>
> (e) When the construction contract does not include guarding of the davit or site;
>
> (f) When reasonable care on the employee's part is inadequate protection against injury?

If the question is answered as the trial judge answered it, then a second question is:

> Could the Injury to Plaintiff Have Been Prevented If the Government Had Exercised Due Care?

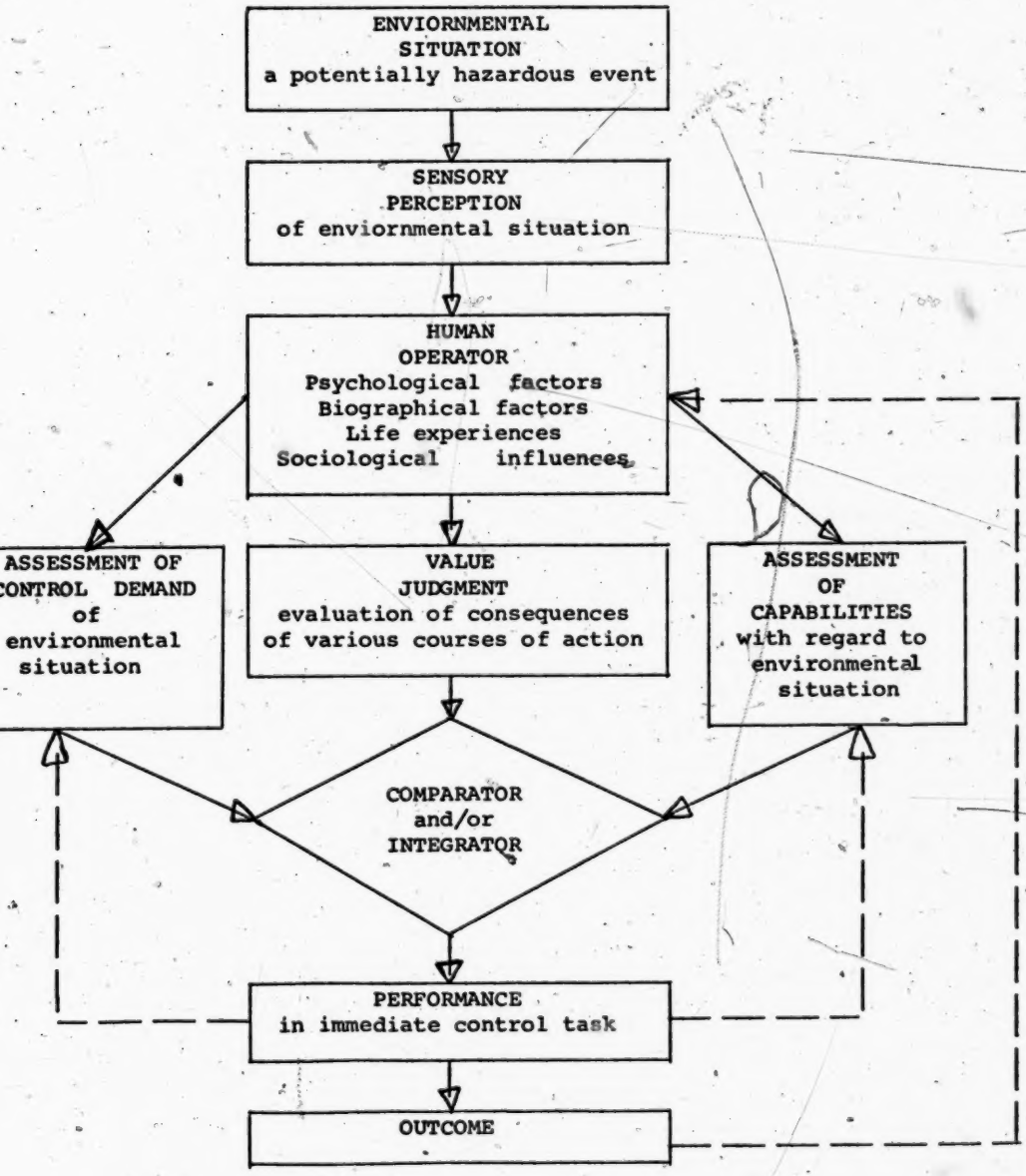
The answers to these two questions are distinctly related to the fields of safety engineering, human factors engineering, ergonomics and biotechnology. They are peculiarly concerned with man in the work environment and include:

(a) Definition of hazards;

(b) Risk recognition;

(c) The point at which there is an unsafe or dangerous combination of hazard and risk;

(d) Risk acceptance or risk rejection and all of the factors which go into that very complex decision process.



Risk Acceptance Schema. (5)

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[5] Decision Making In a Risk Taking Environment, by Daniel Molnar, Ohio State, Columbus, Ohio (1963)

The trial judge relied on expert opinion in the field of safety engineering from the same people whom the defendant had relied on for decades to formulate the accident prevention policy for construction of the Cape Kennedy space center, major dams, harbors, locks, airports, etc.

It is "clearly erroneous" for an appellate court to find, that in so doing, the trial court abused its historic discretion, particularly when to do so the appellate court had to plead ignorance of a specialized field of knowledge called safety engineering.

Recently this court has been willing to review concurrent findings of fact by two courts below and indeed three judges have found that the findings of two courts below were "clearly erroneous". (See *Berenyi v. District Director, Imm. & Nat. Serv.*, 385 U.S. 630, 87 S. Ct. 666.)

This court has recently felt it necessary to overturn a Court of Appeals' reversal of a trial judge on a claimed abuse of discretion. (*Gruenthal v. Long Island R. Co.*, 393 U.S. 156, 89 S. Ct. 331.)

The case at bar is a much more serious abuse of Rule 52 (a) appellate review power.

IV.

A FURTHER CLARIFICATION OF MARITIME JURISDICTION IS NEEDED TO RESOLVE A DISPUTE IN CIRCUITS.

The injury occurred at a lighthouse in Lake Michigan and involved hazards and risks associated with maritime services, i.e., the use of a maritime boom, the need for second deck guard rails, the lack of contrast between concrete and water, the rusting of the davit machine by water spray, wind, etc. It occurred at a lighthouse used solely as a navigational aide and on a navigable waterway of the United States, Lake Michigan, and in the performance of a maritime contract of repair and replacement of the electrical system at the lighthouse.

This Court has recently by unanimous decision made a rather exhaustive examination of admiralty jurisdiction (*Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct —.) and this has been helpful and presumably supports the petitioner although it can be agreed that it does not do it conclusively.

Rodrigue; The Blackheath, 195 U.S. 361, 25 S. Ct. 46 and *Hastings v. Mann,* 340 F 2d 910 (CCA 4), cert. denied 380 U.S. 963, 85 S.Ct. 1106, have each suggested that admiralty jurisdiction extends to injuries at a lighthouse, used solely as a navigational aid.

It would be ridiculous for petitioner to suggest a "lighthouse" rule of maritime jurisdiction. The courts have firmly adopted a "locality" rule of maritime tort jurisdiction and forged a major exception: if the tort occurs on water, it is not a maritime tort if the tortious conduct took place on a dock, pier, wharf, jetties or railway running into the sea because these have historically been instruments of land commerce .

The Sixth Circuit alone among the circuits has been attempting to forge a new rule of maritime law which rejects the historic locality test and substitutes in its place a case by case review peculiarly susceptible to a decision in accord with the philosophy of the trial or appellate judge.

Petitioner submits that a correct statement of the law is well pressed in *Weinstein v. Eastern Airlines, Inc.*, 316 F 2d 758 (CCA 4), cert. denied 84 S. Ct. 343.

Since the petitioner is entitled to recovery under the District Court's findings of fact, it is irrelevant whether maritime law, as supplemented by Michigan law or Michigan law itself is the law used in determining whether a private person would have been liable to the petitioner. It is therefore not necessary for the Supreme Court to examine the conflict in the circuits over maritime jurisdiction.

It is respectfully suggested, however, that the issues presented in the first two questions give the court in addition an ideal opportunity to terminate the unnecessary detouring from the locality rule by the Sixth Circuit with its resulting confusion.

RELIEF SOUGHT

Certiorari should be granted and the Circuit Court should be reversed per curiam.

Respectfully submitted,

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Dated: Detroit, Michigan
September 15, 1969.

APPENDIX A

UNITED STATES OF AMERICA

In the District Court of the United States for the Western District of Michigan, Southern Division

Clifford Gowdy, Plaintiff, v. United States of America, Defendant and Third Party Plaintiff, v. Whittaker Electric Company, a corporation, Third Party Defendant.	Civil Action No. 4897

OPINION

This matter involves a personal injury action brought by plaintiff, Clifford Gowdy, against defendant, United States of America, pursuant to the Federal Tort Claims Act, 28 USCA 1346(b) and 2671, et seq., for the recovery of damages allegedly caused by the defendant. A third party action was subsequently instituted by the defendant as third party plaintiff against Whittaker Electric Company, employer of plaintiff. The third party action was separated from plaintiff's suit on August 15, 1966.

The Tort Claims Act provides in part that the United States District Court "shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act

or omission of *any employee of the Government* while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 USCA 1346(b). (Emphasis supplied.)

On December 20 through December 23, 1966, a trial was held before the court without a jury. The facts stand as follows:

The United States contracted with Whittaker Electric Company to completely replace and renew the foghorn and light, and other existing equipment at the south breakwater lighthouse in Muskegon, Michigan.

The lighthouse is located at the extreme end of the south breakwater guarding the channel from Lake Michigan into Muskegon Lake. The breakwater runs from the east shore of Lake Michigan near Muskegon in a generally westward direction for a distance of approximately a thousand feet. It consists of concrete and stone, and is supported by piles sunk into the lake bottom.

Constructed of heavy gauge steel, the lighthouse rests on an elevated foundation which rises about three feet above the breakwater. It has a single room called the "machinery room" (approximately eight by ten feet) which houses electrical generators and machinery.

Projecting up from the roof of the machinery room is an enclosed tower on which the foghorn and light are mounted. The only means of reaching the top of the tower is a ladder running from the floor of the machinery room to an opening in the roof, through the enclosed tower to the top.

Since the base of the tower is not large enough to cover the entire roof of the machinery room, it is possible for one to stand and walk on a working platform on the east side of the roof in a rectangular area four by eight feet.

There is a radial davit which rotates three hundred sixty degrees on the northeast edge of the roof of the machinery room. At its base the davit is perpendicular to the roof of the machinery room. From its base the davit projects straight up above the roof to a height of about six feet, and then begins gradually to curve away from the perpendicular line of its base to a height of about ten to twelve feet.

There is a circular ring at the upper end of the davit called an eye, to which lines, tackles, and hoists may be attached. The davit is made of heavy gauge steel, and is fitted into a socket in the roof of the machinery room. The davit is completely exposed to the elements, so that because of rust, it is necessary to use a heavy 24-inch or larger pipewrench to turn or rotate the davit.

Whittaker Electric Company's employees began work on the lighthouse about August 1, 1963. The crew performing the work consisted of a superintendent, Fred Curow; a foreman, Charles Smith, who was also a journeyman electrician; and plaintiff, a second journeyman electrician.

Plaintiff, in addition to helping remove, repair and replace machinery and electrical equipment in the lighthouse, also assisted in the removal and replacement of the steel door of the machinery room at the beginning and end of each working day. The door was removed and replaced through the use of a chain hoist which was connected by a Whittaker employee to the davit on the edge of the roof of the lighthouse. This procedure was used primarily to

facilitate the removal of old equipment and the installation of new equipment in the machinery room.

On August 23, 1963, the Whittaker Electric Company crew, consisting of the foreman and plaintiff, arrived at the lighthouse by boat, as they had done previously for about three weeks.

The foreman and plaintiff worked on and about the lighthouse until about 4:00 P.M., when they began preparing to suspend operations for the day.

Plaintiff, as he had done eight to ten times before that day, went to the roof of the machinery room by way of a ladder made of rungs about one foot in width and attached about one foot apart on the outside of the machinery room. Plaintiff then began operating the ratchet hoist to replace the machinery room door. The ratchet hoist was suspended from the eye of the davit, and attached to the other end of the hoist through a ratchet was a chain which was also attached to the door.

As the hoist was operated, the davit took up slack in order to lift the door; it could also be let off to lower the door. To operate the lift in this manner, plaintiff had to stand about one foot from the edge of the roof, lean forward toward the edge of the roof, and reach over his head with one of his hands to grasp the end of the ratchet hoist handle. The ratchet was about eighteen inches long. Because of his height he was only able to reach approximately three inches of the handle of the ratchet.

While in this position, after having taken up the slack in the chain, and as he was attempting to operate the handle of the ratchet hoist to raise the steel door so that it could be swung into position, and while the door was still

resting on its bottom edge, plaintiff lost his balance and fell from the top of the roof to the concrete foundation.

As a result of this unfortunate accident, plaintiff sustained serious injuries, including comminuted fractures of both heels which caused, besides pain and suffering, hospitalization and treatment over an extended period of time, loss of earnings, and medical expenses.

Plaintiff alleges that the defendant, among other things, was negligent in hiring an incompetent contractor and in not exercising reasonable care in the performance of its right of control over plaintiff's employer; negligent in furnishing unsafe equipment and in acquiescing in tortious conduct and in giving ambiguous orders to an independent contractor, and negligent in failing to warn of the dangerous condition of the lighthouse, and in failing to provide a reasonably safe place to work.

The United States defends by claiming it owed no duty to plaintiff Gowdy because he was an employee of an independent contractor, and also because the hazard was obvious and plaintiff was guilty of negligence. Essentially, defendant claims duties and obligations existed between the independent contractor and plaintiff, but not between plaintiff and defendant.

Plaintiff also contends that maritime law applies to his claim under the Federal Tort Claims Act.

It is axiomatic that in the absence of a maritime status between the parties in a personal injury action, the traditional test of locality of the tort governs the question. Lauritzen v. Larsen, 345 U.S. 571, 97 L.Ed. 1254, 73 S.Ct. 921 (1953); Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 58 L.Ed. 1208, 34 S.Ct. 733 (1914); The Plymouth, 70 U.S. (3 Wall.) 20, 18 L.Ed. 125 (1866).

Although the "locality" rule is simply stated, its application is rather difficult, as is evidenced by the number of cases which have dealt with it. Our burden is considerably lightened, however, by the recent decision of the Sixth Circuit Court of Appeals in Wiper v. Great Lakes Engineering Works, 340 F. 2d 727 (C.A. 6); cert. den. 382 U.S. 812 (1965), which involved an action against a dock owner for the death of plaintiff's husband who was found drowned in a slip.

In reaching its decision, the court said:

> "Under the allegations of the complaint, defendant's negligently kept dock resulted in decedent's death by drowning in navigable waters, and therefore plaintiff contends that the tort should be deemed to have occurred in navigable water. However, docks and wharves are considered as extensions of land (citations omitted), and therefore the negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to *determine the maritime or non-maritime nature of this action but only as it relates to damages* (citations omitted)." 340 F. 2d at 730. (Emphasis supplied.)

In the instant case, plaintiff's injury occurred as a result of defendant's failure to guard the second deck of the lighthouse.

In Hastings v. Mann, 340 F. 2d 910 (C.A. 4); cert. den. 380 U.S. 963 (1965), the court observed with respect to lighthouses that:

> "Lighthouses, beacons, buoys and other navigational aids are not encompassed within the land extension doctrine. Usually, they are surrounded by water and they have historically been regarded as subjects of Admiralty jurisdiction. They are readily distinguishable from piers and wharves extending over navigable waters and designed and used for the purpose of providing access to vessels afloat for people and land based vehicles and equipment." 340 F. 2d at 911.

The Muskegon lighthouse is a beacon which leads the ships safely into the Muskegon Harbor. It functions solely as an essential navigational instrumentality.

A lighthouse is not encompassed within the extension of land doctrine, and it is equally true that a breakwater is distinguishable from a wharf or pier.

Robert L. Jenkins, director of safety for the United States Army Corps of Engineers from approximately 1948 to 1964, testified that the purpose of a breakwater is to break the force of the waves so that they expend their energy as they spill over it.

James A. Gilligan, officer in charge of the Muskegon Coast Guard Station in 1963, and safety officer for that unit, stated that water did spill over the breakwater and that during the winter months it was not unusual for the lighthouse to be covered with ice.

Plaintiff's and his foreman's use of a boat to travel to and from the lighthouse is further evidence of the maritime nature of the breakwater.

That a breakwater may recommend itself as an attractive fishing retreat during the summer months is not sufficient in our eyes to include it in the category of wharves

and piers for the purpose of defining admiralty jurisdiction. Accordingly, we hold that maritime law is applicable.

> " '[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. Garrett v. Moore-McCormack Co., 317 US 239, 245.' " Hess v. United States, 361 U.S. 314, 319, 4 L.Ed 2d 305, 310, 80 S.Ct. 341 (1960).

We, therefore, look to the substantive law of Michigan to determine whether defendant as a landowner negligently breached a duty to plaintiff.

Negligence, as Holmes once observed, is a "featureless generality" which because it is subject to the crosscurrents of life, is constantly in a state of legal flux. It is not a fixed concept, but an evolving standard designed to prevent or deter what reasonable people believe is, for the lack of better terms, anti-social or wrongful conduct. Its essence is lack of care.

The circumstances of each case supply the features from which breaches of duty and negligence arise.

Chief Justice Cooley in Detroit & Milwaukee R.R. Co. v. VanSteinburg, 17 Mich. 99, 118, 119 (1868), stated that negligence "consists in a want of that reasonable care which would be exercised by a person of ordinary prudence *under all the existing circumstances, in view of the probable danger of injury.*" (Emphasis supplied.)

Before Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W. 2d 873 (1958), Michigan courts "gratuitously [conferred]" honorary degrees upon the abstract concept of reasonable care.

In Spence, Justice Voelker, speaking for the Court, said:

> "Care does not increase or diminish by calling it names. We think the abstract concept of reasonable care is in itself quite difficult enough to grapple with and apply in our law without our courts gratuitously conferring honorary degrees upon it. There is only *one* degree of care in the law, and that is the standard of care which may reasonably be required or expected under all the circumstances of a given situation. * * *" 353 Mich. at 130, 90 N.W. 2d at 878.

Justice Voelker's admonition to analyze all of the evidence in each case and to avoid uncritical application of general rules is particularly appropriate to the present case, since the thinking inherent in such "open sesame phrases" as whether a danger was obvious, or whether defendant controlled the employees of the independent contractor, or whether there was a duty owing plaintiff from defendant, could make for simple and swift resolution of this case, despite a multitude of facts and circumstances which militate to the contrary.

Some courts in situations where there is fault resulting in harm to another have excused the wrongdoer from liability by saying there was no duty owed by the wrongdoer to the injured party.

Cases in which an injured employee of an independent contractor sues a landowner for injuries sustained as a result of claimed negligence on the part of the landowner lend themselves to temptations to simplism. It is important in these cases to distinguish "* * * between the problem of restricting liability to a negligent party, and the problem of restricting the liability of the defendant even though he was negligent * * *." This distinction "* * * is one that is fundamental to an understanding of

cases involving personal injuries for open and obvious dangers."[1]

The uncontradicted evidence establishes that the second deck of the lighthouse was originally protected by guardrails; that the guardrails were removed after they had fallen into a state of disrepair because of icing and severe climatic conditions; and that defendant, aware of this unsafe condition, nevertheless invited the employees of Whittaker to use the area while they were working on the lighthouse.

James Gilligan testified that in obedience to Coast Guard regulations, he required Whittaker employees to replace and lock the door to the machinery room at the end of each

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[1] Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 U. Pa. L.Rev. 629, 632 (1952). In the same article Keeton observed at page 632:

> "While statements are frequently made that without a duty there can be no negligence, this is misleading and not in accordance with the usage herein. A driver of a car can be negligent as a matter of law in failing to give a proper signal when turning to the left or right and yet not be liable to a passenger-guest who is hurt in precisely the manner that should have been anticipated. This is because for *various reasons of policy*, other than the need for limiting liability in some manner, courts have concluded in view of the relationship between the parties *to restrict the defendant's duty of care*. Thus, conduct more reprehensible than negligence must be found to justify the imposition of liability on a defendant to a passenger-guest in an automobile or to a trespasser on land. *The lack of a duty in such instances does not mean and should not mean that the defendant has acted prudently.* It simply means that even though he was guilty of anti-social conduct and *conduct that should be discouraged*, the achievement of *socially desirable ends or objectives that will be hindered by shifting the loss from the defendant to the plaintiff is a weightier consideration.* Admittedly, a judge will often say that there was no duty to do something *when in reality he means* that it could not be said that it was negligence not to do it. This is unobjectionable since there is no liability without fault, i.e., negligence, *but the lack of duty in such a case is covered by the general requirement of fault, whereas there are numerous examples of non-liability even though the fault or negligence requirement of liability is satisfied.*" (Emphasis supplied.)

working day. He admitted he told Frederick W. Curow, administrative supervisory employee of Whittaker, that the davit would be in good working order if he decided to use it. Gilligan also stated that he attempted to visit the site daily and was aware that the davit was being used, although he could not recall the kind of device being used on it. He estimated that during the course of their work on the lighthouse the employees of Whittaker probably removed and replaced the door at least eight to ten times.

Defendant contends that notwithstanding any knowledge it may have had of plaintiff's use of the second deck of the lighthouse, it did not violate any of its duties to plaintiff.

If the second deck of the lighthouse were not a working platform, and if the defendant in this case were a typical landowner unaware of the sophisticated nuances of safety engineering, we might probably agree that defendant discharged its duties to plaintiff.

A knowledgeable landowner, however, experienced and skilled in advanced techniques of safety engineering, familiar with the hazards of construction, and who in the exercise of prudence and due care could have prevented the accident because of its reservoir of safety engineering knowledge, should not be measured by the standards governing a landowner's duties to an invitee where the knowledgeable landowner has the resources to remedy the defect, and particularly where the work in issue is hazardous.

In "Tort Liability of Owners and General Contractors For On-The-Job Injuries to Workmen," 13 UCLA L. Rev. 99, 124 (1965), an analysis of California's Workmen's Compensation Act and relevant cases, Wayne A. Brooks concluded with this pertinent observation:

> "Even before owners and general contractors are brought within Workmen's Compensation, the 'inde-

pendent contractor' concept should be abandoned *in the interest of clarity in analysis. The crucial question is the extent of involvement of owners with job conditions, not responsibility on respondeat superior grounds. The knowledgeable owner, who is familiar with hazards involved and who could prevent injury, should be viewed differently from the owner who, by hiring a responsible contractor, has done as much as can be reasonably expected of him.* The former class of owners is expected to take precautions under the inherently dangerous activities rule, and since the purpose of liability is the same in either case, it necessarily follows that the duties should be the same under the statutory safety provisions." (Emphasis supplied.)

Viewing the proposition according to the teachings of Spence v. Three Rivers Builders & Masonry Supply, supra, in Michigan we can say that the superior knowledge of such a landowner is a distinguishing circumstance in the totality of circumstances which sets him apart from the general type of landowner such as a householder, or small businessman unaware of safety engineering.

Safety engineering has acquired a position of a fine art, whereby accident-prone situations are readily ascertainable and reasonably avoidable by the timely application of corrective practices and methods. As a profession it has developed clearly acceptable and well defined standards.

As a leader in the field, the United States Government is in the forefront in advancing safety standards. The United States is among the most knowledgeable in the field of safety engineering.[2]

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[2] Tools of safety engineering are basically: (1) safety standards, safety codes, safety practice sheets, bulletins and memoranda; (2) safety manuals; (3) statistics; (4) technical journals; (5) safety equipment catalogs; and (6) past accidents.

There is a continuing President's conference on industrial and construction safety. The Bureau of Labor Standards is one of the prime formulators of safety standards in the United States. The Army Corps of Engineers, the United States Navy, its Bureau of Yards and Docks, the United States Coast Guard, General Services Administration, and practically every unit involved in public buildings, installation, construction, maintenance and repair, have well established, coordinated, and defined safety practices and standards.

Many of these governmental agencies work in close harmony with private organizations, such as the American Society of Safety Engineers, and the National and Local Chapters of the General and Associated Contractors of America. They are all fully aware of the latest safety techniques and procedures.

Witnesses Bisel and Jenkins are professionals in the field. They were employed by the United States Government at the time of this accident. Bisel was the top ranking civilian safety employee in the Coast Guard field of safety engineering. Their knowledge was the knowledge of the United States, as the United States acquires its knowledge in the only manner if can, through its officers, agents, servants and employees.

Unquestionably the United States has far greater knowledge in this field than Gowdy or Whittaker. This superior knowledge is important in recognizing existence of risk. The eminent scholars and lawyers of the American Law Institute declared its importance in 2 Restatement, Torts, §289. This section provides in part, as follows:

"Recognizing Existence of Risk

The actor is required to recognize that his conduct involves a risk of causing an invasion of another's

interest if a reasonable man would do so while exercising

* * *

(b) such *superior attention, perception, memory, knowledge, intelligence, and judgment* as the actor himself has." (Emphasis supplied.)

Frederick F. Bisel, a civilian safety engineer for the United States Coast Guard from September 15, 1948 to December 30, 1965, testified that the second deck of the lighthouse was an unsafe working area, absent the required guardrails. He stated that the Whittaker employees did not go out to the lighthouse with guardrails as a part of their thinking, but rather to do a job, and that it was the responsibility of other people to protect them against hazards inherent in their work. "We give a man safety goggles against splashes of acid. Are we going to depend on him to protect his eyes? We give men hard hats against falling objects. Are we going to depend on him to buy his hard hat? No, sir. We are going to buy the hard hat and give it to him, and we are going to provide him with all personal protective protection, apparel and equipment, necessary to protect this man from the hazards inherent to this work. This is management's responsibility." (Record, p. 147.)

Bisel further testified that the publication, "Manuals—Corps of Engineers, U.S. Army, EM 385-1-1 13 March 1958, 'Safety—General Safety Requirements,'" a primary source of safety regulations and procedures used by the Coast Guard at the time of the accident, required among other

things, that elevated working surfaces be protected with guardrails and toeboards.[3]

He also stated that each year in observance of January as "Falls Prevention Month," as annually proclaimed by the Treasury Department, his office would publish a bulletin directing that each unit inspect all of its elevated working areas. To obviate the necessity of publishing an annual bulletin, he assisted in 1963 in publishing General Administration Instruction No. 15-63 or Commandant Instruction 5100.3A, which provides in part that each unit safety officer shall determine that elevated surfaces are properly guarded to prevent falls to persons, insure that personnel are instructed on the importance of placing guardrails around floor and deck openings when covers are removed, *inspect permanent guard railings for deterioration and*

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[3] At page 68 of the Manual under the heading, "Guarding," the following regulations are set forth:

"20-21., Runways, ramps, platforms, elevated work surfaces, and scaffolds of 6 feet in height or more above the adjoining surface shall be effectively guarded as follows:

a. Guard rails of such height and stability as the nature of the work being performed, or contemplated use, may require (wooden guard rails shall be rigidly supported at intervals not greater than 8 feet). The height may vary from 36 to 42 inches and intermediate rails shall be provided.

b. Toeboards not less than 6 inches in height or side screens shall be provided as necessary to protect workmen, the public, or property below the working level from falling objects.

* * *

f. During construction, all openings—floor, roof, stairwell, shaftways, pits, and similar unguarded locations shall be provided with an inclosure guard securely anchored in the opening (plate 19). If the use of such a guard is not considered feasible, then the openings shall be decked over solid or closed with material and bracing of sufficient strength to support any load which may be imposed, and properly anchored to prevent accidental displacement."

ascertain that safety belts and life lines are used for all hazardous elevated work.[4]

These regulations are important as evidence of defendant's application in practice of its superior knowledge of safety engineering.

Defendant argues that despite any knowledge which it may have had of safety engineering, the plaintiff failed to establish liability since the absence of a guardrail was an open and obvious danger, and furthermore, because there was no proof the defendant exercised any control over Whittaker's employees. Not all supposedly open and obvious dangerous situations free a defendant from liability or preclude a plaintiff from recovery.

In Ackerberg v. Muskegon Osteopathic Hospital, 366 Mich. 596, 115 N.W. 2d 290 (1962), a case involving an appeal from a directed verdict in a personal injury action brought against the defendant, Muskegon Osteopathic Hospital, for failure to erect a guardrail or other protection on a platform around the front of defendant's emergency entrance, Michigan's Supreme Court acknowledged that a landowner may have a duty to protect invitees from so-

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[4] Paragraphs 1(h), (i), (j) and (k) of enclosure 2 to the Instruction provide that each unit safety officer shall:

"h. *Determine that elevated surfaces are properly guarded to prevent falls of persons or falling objects and that stairways, steps, and ladders are in good repair and meet the standards for elevations, height and width of risers, lighting, and handrails.*

i. Make sure that personnel realize the importance of placing guards around floor and deck openings when covers are removed.

j. *Make frequent inspections of floors, docks, stairways, ladders, and permanent guard railings for deterioration which may cause a breakthrough.*

k. Ascertain that safety belts and life lines are utilized for all hazardous elevated surface work." (Emphasis supplied.)

called open and obvious dangers where the invitee's attention is distracted. Justice Kavanagh, speaking for a unanimous court, said at page 601:

> "The test, then, in the instant case is, would all reasonable men agree as to whether or not defendant hospital had a duty to construct a guard or protection around the rear platform which was used by the general public entering and leaving the emergency entrance of the hospital in an excited state.
>
> "The declaration alleges that defendant hospital knew or ought to have known that people using the emergency entrance would be under the strain of physical and emotional shock and, in the exercise of reasonable care, should have provided a guard of some type on this platform.
>
> "We think when situations such as this arise, considering the attendant excitement and mental and emotional condition of the individuals entering and leaving an emergency entrance to a hospital, reasonable men might differ as to whether or not there was a necessity for the construction of a guard rail to protect those on or about the platform as business invitees." 366 Mich. at 601, 115 N.W. 2d at 293.

See also Gugel v. Sears, Roebuck & Company, 308 F. 2d 131 (C.A. 6, 1962), cert. den. 371 U.S. 692 (1963).

Prosser also recognizes that circumstances may transform an obvious danger into *a latent, or at least deceptive danger.*

> "In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something

more in the way of precautions may be required. This is true, for example, where there is reason to expect *that the invitee's attention will be distracted, as by goods on display, or that after lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonbly be expected,* and for some reason, such as arm full of bundles, it may be anticipated that the visitor will not be looking for it. It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open for him for his use, *it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough.* It is generally agreed that *the obligation as to the condition of the premises is of such importance that it cannot be delegated, and that the occupier will be liable for the negligence of an independent contractor to whom he entrusts maintenance and repair."* (Prosser, Law of Torts, 404, 405, 3rd Ed. 1964.)

Robert L. Jenkins stated that guarding is absolutely necessary to protect workers from falling off elevated working surfaces. He observed that it must be recognized that a worker is not hired fundamentally to watch his step, and that a worker on an elevated working platform may because of distractions or lack of contrasts in the surrounding environment, be led off the edge even though he may think he is acting carefully.

"Q. What is involved in a recognition of danger by an industrial worker? What are the elements of the recognition of danger?

A. Well, in the recognition of danger in an industrial worker, a good deal depends on the environment setting that the particular situation might be in, and the competition or the burdens upon the worker which compete with this recognition. This might be noise, it might be the lack of contrast, it might be lighting. There are many, many things that could compete with it and, Mr. Philo, this really is the principle of guarding.

Q. What is involved in guarding as such?

A. Well, guarding is a recognition of this matter of recognizing danger by a worker. We have found in analyzing accidents and interrogating workers, that they had these things competing with them. And we must recognize one thing, a worker is not hired fundamentally to watch his step. Or to be careful. And this is very much of a secondary consideration. He doesn't want to get hurt. *A worker very often recognizes, he thinks he is being careful, he wants to be careful. Most people, workers that get killed, get hurt, feel that they are being careful.*" (Record, pp. 33, 34.)

* * *

"Q. Why do you say and why has your testimony been that the only way of preventing a fall in the exercise of due care from an elevated surface is a guard-rail?

A. Well, this comes back, Mr. Philo, to the fact that a danger exists whenever any [redacted] goes above the ground level. The hazard exists if there is an opening either in the floor or the edge that an individual might fall from. And then the risk is the probability of

workmen either falling through the hole or stepping from the edge.

Now, on a platform, for example, the further one gets from the edge of a hole, the risk diminishes. And the closer they get to the edge, the more acute the risk becomes.

I said, Mr. Philo, that the guardrail was the only means of effectively controlling this risk is because the workman at the edge or exposed to this hazard, he may feel he is performing in a very safe manner; but we have these subtle situations of something leads him, distracted his attention, leads him and will lead him right from the edge. Or it might be a contrast. And this is very true, we find statistically and through observation, in the matter of contrast, where any structure around water particularly, concrete and water on certain situations, there's no contrast. And an individual may feel he is perfectly safe and working in a safe manner, and something which seems to be an obvious hazard is a very subtle one; and he is led right off the edge unless he is physically restrained." (Record, pp. 39-41.) (Emphasis supplied.)

From the testimony of Bisel and Jenkins, it is clear defendant was aware, or should have been aware, that plaintiff's attention while operating the davit on the second deck would be primarily focused on removing and replacing the door, and distracted from the subtle and alluring hazard before him which led him from the edge into space and his injury, even though at the time he may have thought he was acting carefully. Such knowledge is a part of safety engineering expertise.

Both Jenkins and Bisel agreed that the work plaintiff was engaged in at the time of the accident was hazardous.

Bisel observed that in lieu of removing and replacing the door each day, the machinery room could have been shored up with a temporary door, thus entirely avoiding the hazardous occupation.[5]

On the issue whether it was necessary for plaintiff to establish defendant exercised control over Whittaker's employees, in Ackerberg v. Muskegon Osteopathic Hospital, supra, the court cited with approval Section 343 of Restatement of Torts, Second, which provides:

> "§343. Dangerous Conditions Known to or Discoverable by Possessor.
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if,
>
> (a) *knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and*

---

[5] "A. I'll consider this a hazardous job to the feet, to the hands, to the head, to falls; I'll consider that this panel should have been removed once and some facility made for temporary shoring up of this place where the door could have been a little wider and lock the door.

But every day that they moved this, this jury-rig [jerry-rig], they were not only endangering somebody falling and people's heads, toes, and hands, this is a heavy object and it was operated by an uncontrolled device.

* * *

"A. I think if all the parties involved in this would have had any recognition of safety and were real concerned, that is, those officials who had to do with this, would have sure made arrangements that this door wouldn't have to be taken off every day; there would have been some arrangements made this could have been shored up with a temporary door, and this door would have been made out during the course of the contract. The people is what we are vitally interested in for safety." (Record, pp. 127-8.)

(b) *should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and*

(c) *fails to exercise reasonable care to protect them against the danger.*" (Emphasis supplied.)

The primary purpose of Section 343 is to require a landowner to protect invitees against dangerous conditions on his premises when he realizes or should realize that they will fail to protect themselves against the danger.

Knowledge of construction, maintenance and repair of lighthouses on navigable waters and the dangers inherent in their conditions and environs is uniquely within the cognizance of the United States and precisely within the jurisdiction of the Coast Guard. The United States should have anticipated harm to invitees using the second deck of the lighthouse, despite the invitee's knowledge of its dangerous conditions.

Section 343(A) of Restatement of Torts, Second, makes the intent of Section 343 quite clear, as it states:

"343 A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated." (Emphasis supplied.)

Control is not a necessary element for the application of Section 343, or for the imposition of liability where the issue is whether a landowner such as the defendant has a duty to maintain his premises in a safe condition for the employees of an independent contractor.

In McCord v. U. S. Gypsum Co., 5 Mich. App. 126, 145 N.W. 2d 841 (1966), the defendant, a landowner, was held liable to the employee of an independent contractor for failing to warn the employee of the existence of a skylight on the roof of its plant.

The case at bar is similar to McCord insofar as we have found that the defendant should have been aware that the plaintiff would not, while operating the davit, recognize the danger inherent in working on an unguarded elevated working surface in a concrete and water environment, and that the absence of a guardrail presented a deceptive and hidden danger to the plaintiff.

Defendant's claim that plaintiff was guilty of contributory negligence is unfounded. From the testimony of defendant's former safety experts, we conclude that the attention of a reasonable and prudent workman, such as plaintiff, while working on the second deck of the lighthouse, would be concentrated almost exclusively on his work effort and that lulled into a sense of security, he could easily be lured into a position of danger.

Under such circumstances, a workman would not be guilty of contributory negligence. Plaintiff was not guilty of contributory negligence.

Even if plaintiff were guilty of contributory negligence, it would not defeat recovery, since under admiralty law comparative negligence is the rule.

A prerequisite to liability under the Federal Tort Claims Act is that the act or omission be by an "employee of the United States." In Indian Towing Co. v. United States, 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955), Justice Frankfurter said:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." 350 U.S. at 68, 69.

In this case we have the omissions and acts of James Gilligan, the officer in charge of the Muskegon Coast Guard station at the time of the accident and the omissions of the Coast Guard officers along the chain of command.

Some time before August 13, 1963, the second deck of the lighthouse was equipped with guardrails which conformed to the standards of construction and safety requirements of the Coast Guard for elevated working platforms. After they had fallen into a state of disrepair, James Gilligan and his superiors failed to repair or replace them, even though they were, or should have been, fully aware that reasonable care demanded this be done. The Commandant's safety policy admits of no other conclusion.

Lest it be construed that we are measuring the defendant's conduct by its own standards and regulations as opposed to the common law concept of due care, we emphasize that the Coast Guard regulations are important only as evidence of the defendant's knowledge of the hazardous condition which was created absent the required safeguards.

In reference to this, the cases cited by defendant, United States v. Page, 350 F. 2d 28 (C.A. 10, 1965), cert. den. 382 U.S. 979 (1966), Grogan v. United States, 341 F. 2d 39 (C.A. 6, 1965), Kirk v. United States, 270 F. 2d 110 (C.A. 9, 1959), and Richardson v. United States, 251 F. Supp. 107 (W.D. Tenn., 1966), and the recent case of Eutsler v. United States, — F. 2d — (C.A. 10, 1967, No. 8854, April 12, 1967), are inapposite, since in each of those cases the plaintiffs attempted to recover primarily on the ground that the defendant had by contract and conduct (government safety program) assumed responsibility for the safety practices of independent contractors.

Further, none of the above cases treated the question of whether the government has a duty to maintain its premises in a safe condition for its invitees.

Also, Eutsler v. U. S., supra, U. S. v. Page, supra, and Richardson v. U. S., supra, are distinguishable in that they involve attempts by employees of independent contractors to recover for injuries resulting from explosions on premises of independent contractors.

Eutsler, supra, relies substantially upon the general rule found in a special note to Chapter 15 of Restatement of Torts, Second, at pages 17-18 of the American Law Institute's Tentative Draft No. 7. It stated in effect that since a workman's recovery is generally regulated by Workmen's Compensation Acts, the theory of which is that the insurance out of which the compensation is to be paid is to be carried by the workman's own employer with premiums being calculated on that basis, the cost of the premiums will be included in the independent contractor's contract price, making it unnecessary to impose liability upon one who hires an independent contractor.

Significantly, this special note to Chapter 15 was not included in the final publication of the Restatement of Torts, Second. The Restatement is a distillation of law from accumulated sources to the time of its publication. Exclusion of this commentator's note in the final draft impresses us as a manifest intent not to consider it a part of the restated law.

The Michigan Supreme Court has favorably received the Restatement of Torts and has by decided cases adopted it in many instances.

We hold that the special note in Chapter 15 of Restatement of Torts, Second, found at pages 17-18 of the American Law Institute's Tentative Draft No. 7, is not a pertinent part of the rationale of the controlling law in Michigan.

The case of Corban v. Skelly Oil Co., 256 F. 2d 775 (C.A. 5, 1958), cited in Eutsler, supra, is inapposite. There an employee of an independent contractor was injured while repairing a pump in an oil well for Skelly Oil Co. The court held that if the work was inherently dangerous, the independent contractor's employee became, for the purpose of such work, an employee of Skelly Oil Co. with his rights of recovery limited solely to benefits under the Arkansas Workmen's Compensation Act. This is not the law in the State of Michigan.

Conversely, Woolen v. Aerojet General Corp., 57 Cal. 2d 407, 369 P. 2d 708 (1962), is apposite. There, in an action for the death of an employee of independent contractor engaged to paint the interior of a tank, the California Supreme Court held that the evidence supported a finding that the owner of the tank, knowing of the danger, failed to exercise reasonable care to see that independent contractor took adequate precautions.

It also held employees of an independent contractor come within the word "other," as used in Section 413 of Restatement of Torts, Second.

Defendant says it owed no duty to Gowdy. Risk and duty are related.

Duty is born of danger to others reasonably perceived by the person charged with guarding against the hazard.[6]

Seavey, Mr. Cardozo and the Laws of Torts, 48 Yale L.J. 90, 399, 400 (1939), analyzes among others, three hallmark opinions of Justice Cardozo on the law of torts which treat of "risk and duty": MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Wagner v. International Railway Co., 232 N.Y. 176, 133 N.E. 437 (1921); and Palsgraf v. Long Island RR., 248 N.Y. 339, 162 N.E. 99 (1928). He concludes the decision in Palsgraf "* * * was a natural development of the theorem underlying the two preceding cases," and "* * * the fact that in Palsgraf judgment was given for defendant accentuates rather than throws doubts upon the underlying theorem of the three cases, *which is that risk not merely creates the extent of the liability but defines its limits both with reference to persons injured and to harm.*" (Emphasis supplied.)

In Palsgraf, supra, Justice Cardozo said:

> "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk

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[6] "Q. Uh-huh. Well, now, whose responsibility was it under the contract in this case to provide for the safety of the contract employees?

A. This is the Coast Guard. They are not supposed to permit anybody on their property under these circumstances, whether it's a contractor employee, myself, you, the public.

Q. And why not?

A. Because the hazards are there, and they are not corrected—haven't been corrected." (Record, p. 155, testimony of Bisel.)

to another or to others within the range of apprehension. Seavey, Negligence, Subjective or Objective, 41 H.L.Rev. 6; Buronkay v. Robinson & Carpenter, 247 N.Y. 365, 160 N.E. 400. * * *'It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye.' Munsey v. Webb, 231 U.S. 150, 156, 34 S.Ct. 44, 45 (58 L.Ed. 162) * * *.

"Negligence, like risk, is thus a term of relation. * * * Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right. * * *.

"* * * Affront to personality is still the keynote of the wrong. * * *." 248 N.Y. at —, 162 N.E. at 100, 101.[7]

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[7] Bisel characterized the unguarded condition of the second deck of the lighthouse as an "outright risk," a certainty that anyone using the area on a day-to-day basis as plaintiff was, would sooner or later fall.

"A. You don't have a calculated risk here, you just have an outright risk.

Q. Outright what?

A. Outright risk. That if a man goes aboard that station, it's not a calculated risk that he is going to fall off, it's a positive fact that he's going to fall off if he messes around too much. *After you put your guardrails up, your toeboard, and after your ladder is properly repaired and the goosenecks, then you get into the calculated risk area. But up until this work is done, and this station is put in first class condition for the human being, there's no calculated risk; it's just as sure, if somebody is exposed to this hazard frequently and too often, something is going to happen.*

Q. What is that sir?

A. Because that's the way our accident statistics are based, on the exposure. You can put an automobile at the curve fifty years and it will never hurt a soul. But you put that out in the street, expose it, well things start happening.

Q. Can you look at the structure shown on plaintiff's Ex. 36 and make that determination?

A. I should think you could. I could. That's my business. I am a professional in that." (Record, pp. 155-6.) (Emphasis supplied.)

Cardozo's test throws the problem into one of a relational duty of care owed to the plaintiff, and this duty springs from the possibility of an accident within clear view of the ordinarily prudent eye. Thus, foreseeability is an essential part of this doctrine.

One who possesses the knowledge, skill and ability to perceive and prevent injury to another and fails to act is liable. Bonin v. Gralewicz, 378 Mich. 521, 526, 146 N.W. 2d 647, 649 (1966), cites Palsgraf on the issue of foreseeability of risk and duty.[8]

The United States was in a position to foresee harm to Gowdy. This creates the relationship from which its duty of care to Gowdy arises. It owed a duty to Gowdy; it negligently breached that duty. It, therefore, is liable.

Noel P. Fox,
District Judge

Dated: June 24, 1967.

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[8] "In doubtful situations a jury must say where the line is to be drawn." Cardozo, J., in Bird v. St. Paul F. & M. Ins. Co. (1918), 224 N.Y. 47, 54, 120 N.E. 86, 88. Harper and James, Torts, §18.8, pp. 1058, 1059; Prosser, Torts (3rd ed.) §52, pp. 329, 330.

OPINION ON DAMAGES

Defendant is liable for all injuries which are the natural consequences of the wrongful acts of the defendant, whether foreseen or unforeseen. Woodyard v. Barnett, 335 Mich. 352, 56 N.W. 2d 214 (1953).

Clifford Gowdy is entitled to compensation which adequately and fully flows from the injuries he has sustained as a result of the defendant's negligence. Fair compensation is that which puts the plaintiff in as good a condition as he would have been if the injuries had not occurred. Anything short of this is inadequate. A person who causes an injury to another should not be allowed to cast any portion of the actual or appreciable loss on the party whom he has injured. Olsen v. City of Dearborn, 290 Mich. 651, 228 N.W. 295 (1939); Fiske v. Powell, 349 Mich. 604, 84 N.W. 2d 736 (1937); in re State Highway Commissioner, 249 Mich. 530, 229 N.W. 500 (1930); Grand Rapids & Indiana R. Co. v. Heisel, 47 Mich. 393, 11 N.W. 212 (1882).

Clifford Gowdy is permanently injured. The plaintiff has established a reasonable degree of probability that future damages will occur. Kellom v. City of Ecorse, 329 Mich. 303, 45 N.W. 2d 293 (1951); In re Boyer's Estate, 282 Mich. 552, 276 N.W. 552 (1937), approving Brininstool v. Michigan United Ry. Co., 157 Mich. 172, 121 N.W. 728 (1909).

These future damages are pain and suffering, impairment of earning capacity, and loss of physical power, vitality and capacity to enjoy the normal physical activities of life. Gilson v. Bronkhorst, 353 Mich. 148, 90 N.W. 2d 701 (1958); Howell v. Lansing City Electric R. Co., 136 Mich. 432, 99 N.W. 406 (1904); DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881).

Future damages are under Michigan law to be reduced to the present worth. Document No. 133 of "Desk Book," American Jurisprudence 2d, specifies the present value of a dollar per year for a number of years in the future. Plaintiff has introduced "Vital Statistics of the United States, 1963, Life Tables," Vol. 2 §5, U.S. Dept. of Health, Education and Welfare, Table 5-1, p. 5-7. This document is judicially noticed for all purposes in connection with future damages and life expectancy of the plaintiff. Gowdy was born June 13, 1924, and the table shows a life expectancy of 32.1 years.

Gowdy has been receiving disability payments from collateral sources, such as benefits under the Social Security Act, and the Michigan Workmen's Compensation Act. His medical and hospital expenses were paid by the insurance compensation carrier of his employer, Whittaker Electric Company.

Collateral source compensation does not operate to lessen the damages recoverable by an injured person from a wrongdoer. 15 Am. Jur. Damages, §198; Lebel v. Swincicki, 354 Mich. 427, 93 N.W. 2d 281 (1958); Kurta v. Probelske, 324 Mich. 179, 36 N.W. 2d 889 (1949); Cawood v. Earl Paige & Co., 239 Mich. 485, 214 N.W. 402 (1927); Mazzolini v. County of Kalamazoo, 228 Mich. 59, 199 N.W. 648 (1924).

A wrongdoer takes the injured person as he finds him, and if his wrongful conduct results in aggravation of latent previous conditions of disability or pain, the defendant is liable for aggravation as well as that which originates from the injuries the plaintiff sustained.

Gowdy had a congenital anomaly of his lumbar spine which predisposed him to low back injury, and by reason of his psychiatric structure he was susceptible to grave

emotional difficulties as a result of physical or mental stress. These were aggravated by his fall on August 23, 1963. Defendant is liable for the aggravation of these conditions. Royer v. Eskovitz, 358 Mich. 279, 100 N.W. 2d 306 (1960); Beauerle v. Michigan Central R. Co., 152 Mich. 345, 116 N.W. 424 (1908); Hall v. City of Cadillac, 114 Mich. 99, 72 N.W. 33 (1897), increased susceptibility to pain; Schwingschlegl v. City of Monroe, 113 Mich. 683, 72 N.W. 7 (1897); Wilkinson v. Steel & Spring Works, 73 Mich. 405, 41 N.W. 490 (1889).

Findings of Fact and Law on Specific Elements of Damage

Medical Expenses

Gowdy is entitled to compensation for all of the reasonable medical expenses which were incurred for proper examination, diagnosis or treatment of the injuries sustained by him, or for relief of pain and discomfort resulting from his injuries. Abbott v. City of Detroit, 150 Mich. 245, 113 N.W. 1121 (1907); Sherwood v. Railway Co., 82 Mich. 374, 46 N.W. 773 (1890), approving Power v. Harlow, 57 Mich. 107, 23 N.W. 606; Geveke v. G. Rap. & Ind. R. Co., 57 Mich. 589, 24 N.W. 675 (1885).

Defendant has admitted that plaintiff's medical expenses set forth in plaintiff's exhibits 19-32(e) are fair and reasonable. A summary of these damages follows:

Medical expenses:

Hackley Hospital	$1,010.06	
Drs. Holly, Joistad, et al.	45.00	
Dr. D. H. Giese	275.00	
Dr. E. J. Lauretti	254.00	
Dr. John C. Farmer	10.00	
Drs. Askam, Smith, et al.	40.00	
Drs. G. T. Aitken, et al.	75.94	
Anne Spoelman, anesthetist	40.00	
Dr. M. P. Krenz	12.00	

Other medical expenses:

6 "Blue Bill" statements for shoes and wedges	$ 106.79	
Tate-Weaver Ambulance service.	40.00	
Hammer Drug Store	16.33	
Balbirnie-Apostle Mortuary Ambulance Service	72.00	
5 "Blue Bills," expense of transporting Gowdy from Mears to Muskegon, Michigan for medical care and treatment	288.62	
Total		$2,285.74

Additional medical expenses in connection with severe back complaint: 9-65—11-66, in-patient care Plainwell Sanitarium:

Oceana Hospital	$ 170.85	
Dr. Edwin Williamson	150.00	
Plainwell Sanitarium	234.00	
Total		$ 554.85

Dr. Robert Jarka recommended a triple arthrodesis to the left foot to relieve severe pain and discomfort. We find a total of $1,000 represents a reasonable adjustment for estimated surgical fees of $200-$225, and a hospitalization period followed by physiotherapy.

Physical and mental pain and suffering

Plaintiff is entitled to recover damages for past and future pain and suffering. Howell v. Lansing City Electric R. Co., supra; Brown v. Oestman, 362 Mich. 614, 107 N.W. 2d 837 (1961).

In addition to physical pain and suffering, plaintiff is entitled to compensation for mental pain or discomforts, which includes anxiety, suspense and fright resulting from the injuries he sustained, as well as personal anguish or mental distress he experienced or will experience because of his multiple disabilities. Sherwood v. Railway Co., supra; Abbott v. City of Detroit, supra.

For the first two years, from August 23, 1963 to August 23, 1965, a period of 104 weeks, plaintiff endured great pain and discomfort. This is substantiated by the testimony of his physicians. During this period his pain was acute except for occasional remissive stages of less intense pain. An os calcis injury of the character incurred by the plaintiff is accompanied with a persistence of pain and complaints, even though medically satisfactory mechanical results may be achieved through orthopedic treatment.

Gowdy experiences some degree of pain during all of his waking hours, which is intensified with increased physical activities such as walking, standing or any variation in gait or movement.

The medical testimony establishes a real probability of a continuance of this pain and suffering into the future.

His injuries and pain and suffering in this respect are permanent.

Dr. Emil J. Lauretti, a physician and surgeon who has practiced traumatic and industrial surgery and medicine since 1934, observed that in cases involving fractured heels, patients usually do have many complaints and most of them complain of severe pain. He said: "* * * anybody that has fractured heels have a bad disability. * * * As I say when you have two heel bones fractured, it's *really a terrible disability.*" (Deposition of Dr. Lauretti, pp. 44-5.) (Emphasis supplied.)

Dr. Giese, a specialist in orthopedic surgery, concluded "* * * there will probably be very little improvement as far as pain is concerned, that in all probability he will continue to have substantial amounts of discomfort in both feet." (Deposition of Dr. Giese, p. 42.)

Plaintiff should be awarded $130 per week for the first two years of the period of his injuries. He is entitled to receive $100 per week for 70 weeks, August 23, 1965 to December 22, 1966, date of trial.

We evaluate his future pain and suffering for the period of his 32.1 years of life expectancy at $3,120 per year. We reduce this to its present worth by multiplying $3,120 per year by 15.803, the 5% discount factor.

Loss of physical power, vitality and enjoyment of life

One who sustains an injury as a result of the wrongful conduct of a tortfeasor is entitled to compensation for loss of physical power, vitality and enjoyment of life.

As Justice Sharpe said in Cawood v. Earl Paige & Co., supra, at 239 Mich. 490, 214 N.W. at 404:

> "He will no longer be permitted to enjoy many of the things in life which it may well be said 'make life worth living.' He will always be crippled, and must suffer the inconvenience and humiliation incident to such physical condition."

Plaintiff was truly a family man. His activities centered around his employment and his family circle. His social and recreational activities revolved around his wife, Mary Jo, and their children. These activities included dancing, ice skating, walking through the nearby woods or the Lake Michigan shore, family picnics, mushroom hunting, and shopping. Plaintiff enjoyed solitary walks through the woods and along the Lake shore. He spent considerable time reading. His crippled condition has dislocated the family circle and terminated these highly desirable and happy pursuits. Increased emotional distress has disrupted family harmony.

The testimony, professional and that of friends and neighbors, substantiates the conclusion that Gowdy has lost spirit and that his physical power and vitality are severely curtailed. He is entitled to recover damages for this substantial loss and impairment.

The testimony supports an award in the sum of $60 per week for the period from the date of his injury to the date of trial, 174 weeks.

Plaintiff's impairment is permanent. His future award for loss of the capacity to enjoy life, physical power and vitality is measured at $25 per week ($1,300 a year) for the period of his life expectancy (32.1 years) reduced to its present value by application of the 5% discount factor of 15.803.

Impaired earning capacity

Before August 23, 1963, plaintiff possessed a capability of performing a full range of physical activities in his employment, which required considerable walking, climbing, standing, lifting and carrying of heavy items. All those activities incident to his work as a journeyman electrician he was able to perform with ease. His injuries caused an outright destruction of his ability to work as a journeyman electrician. His disability is total; he cannot resume his former employment or any work which requires a broad scope of physical activities for which he was previously qualified and able to accomplish. Medical testimony establishes a modicum of residuum employability within a restricted and circumscribed area of physical activity, but plaintiff's opportunities for re-employment in the electrical field are minimal, if not in fact non-existent.[1]

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[1] Dr. Robert W. Jarka, an orthopedic surgeon, concluded as of February 18, 1966, that Gowdy was unemployable.

Dr. Lauretti stated:

"In the first place, he might get rid of the greater part of his pain, but I don't think he could ever get rid of all of it; and as far as any unrestricted work, I think this man is disabled from doing certain types of work. * * * The only type of work he would be able to return to would be to work on level ground. As long as the material that he is walking on—be it ground or cement or anything, as long as it is level—he would have less trouble, but he would still have pain. Whether or not he could put in a full eight-hour day, even working on level ground, I can't say. I think that he would still have some pain.

"As far as climbing ladders or poles, or even walking on, say, narrow planks, where he could easily lose his balance and fall, I don't think he could do that.

"Q. What about walking on rough or uneven ground or surfaces?

"A. No, no. He would have trouble." (Deposition of Dr. Lauretti, pp. 25, 26.)

Dr. Giese also concurred in Dr. Lauretti's judgment that Gowdy would never be able to return to his former occupation as an electrical lineman or engage in any work requiring prolonged standing.

In the light of the evidence, we are compelled to the judgment that his injuries are total and permanent. This judgment is likewise that of the Social Security Administration.

Averaging plaintiff's annual earnings during the five years preceding his injuries, we find plaintiff's minimum annual wage then was $6,707.28.

Plaintiff's expert, Professor John P. Henderson, of the faculty of Michigan State University, used this annual minimum earning level in computing plaintiff's past and future impairment of earning capacity. This figure is considerably less than the actual average weekly earnings of Gowdy at the time of his injuries. His immediate pre-injury average weekly wage was $168.50, which is a justifiable basis for computation of the impairment of his earning capacity.

Were we to use the $168.50 figure, the ultimate result would be approximately 20% greater than the amounts computed by Professor Henderson in his testimony.

The prevailing union rate for journeymen electricians in the Western Michigan area is set forth in the testimony, and the prevailing weekly wage for the standard 40-hour work week on the date of the plaintiff's injuries to this date, including fringe benefits, ranges from $164.43 during August of 1963, to $202.88 in June of 1966.

Therefore, when we accept as an annual earning level the $6,707.28 figure used by Professor Henderson, we fix this annual rate on the conservative side of the ledger. It is the minimum established by plaintiff.

Under Michigan law Gowdy should be fully compensated for any loss or reduction in his earning capacity. Canning v. Hannaford, 373 Mich. 41, 127 N.W. 2d 851 (1964); Prince

v. Lott, 369 Mich. 606, 120 N.W. 2d 780 (1963); Routsaw v. McClain, 365 Mich. 167, 112 N.W. 2d 123 (1961); Harris v. Wiener, 362 Mich. 656, 107 N.W. 2d 789 (1961); Lorenz v. Sowle, 360 Mich. 550, 104 N.W. 2d 347 (1960); Miller v. Pillow, 337 Mich. 262, 59 N.W. 2d 283 (1953).

As Justice Dethmers said in Prince v. Lott, supra, at 610, 120 N.W. 2d 782:

> "* * * the factor to be considered in determining such damages is not what plaintiff would have but what he could have earned but for the injury. It is the loss of earning capacity for which damages are to be awarded. Norris v. Elmdale Elevator Co., 216 Mich. 548, 185 N.W. 696; Miller v. Pillow, 337 Mich. 262, 59 N.W. 2d 283; Harris v. Wiener, 362 Mich. 656, 107 N.W. 2d 789."

We have considered that plaintiff has received earnings from other employment since his injury and has worked as a substitute rural mailman. The Michigan Supreme Court has adopted the rule that "impairment of earning capacity is not equated with wage loss."

Conceivably, plaintiff's post-injury income could exceed earnings received from pre-injury employment. This, however, is not the norm of measurement. Plaintiff is entitled to compensation for the entire amount of the established pre-injury earning capacity, so long as there is a continuation to the impairment of that earning capacity. His post-injury employment is insufficient to establish a revived earning capacity when weighed against his established wage earnings capacity as a journeyman electrician.

Impaired earning capacity from the date of the accident to July 12, 1967 is $26,053.96. We here use the annual minimum earning level of $6,707.28.

Professor Henderson based plaintiff's life expectancy upon Table "A" of "The Length of Working Life for Males, 1900-1960" U.S. Dept. of Labor Manpower Report (No. 8), July 1963, as standing at 21.667 years from the date of the trial, December 22, 1966. Because it is approximately six and a half months since the date of the trial, we use a flat twenty-one years as his work life expectancy in computing plaintiff's future impairment to his earning capacity. Again, using the minimum annual income level of $6,707.28 for a period of twenty-one years, this results in a total of $140,852.88.

Under Michigan law, future damages should be reduced to present worth. Professor Henderson testified that according to information obtained from the Bureau of Labor Statistics of the U.S. Department of Labor, future wages are reasonably expected to increase at the rate of 5% per annum. This balances out the 5% formula for reduction of future damages to present worth. Future wage increases that would reasonably be expected by Gowdy would be equal to the adjustment of his future damages to present worth.

Professor Henderson included in his analysis on impairment of future earning capacity loss of fringe benefits which plaintiff would sustain by virtue of his disability. This is a proper element of damages.

Professor Henderson's computations are reasonable, and therefore, adopted by this court. His testimony establishes a total loss of fringe benefits from the date of the accident, computed on plaintiff's life expectancy, as 10.6% of gross earnings. Therefore, 10.6% of $166,906.84 is $17,692.13.

Plaintiff's damages are summarized as follows:

Pain and suffering:

Two years (from date of injury to 8-23-65) at $130 per week..	$13,520.00	
Seventy weeks (from 8-23-65 to the date of trial) at $100 per week.....	7,000.00	
Future—$3,120 × 15.803	49,305.36	$ 69,825.36

Loss of physical power, vitality and enjoyment of life:

$60 per week for 174 weeks....	$10,440.00	
$1,300 × 15.803	20,543.90	30,983.90

Impaired earning capacity:

$6,707.28 per year from date of accident, 8-23-63, to July 12, 1967 (202 weeks)	26,053.96	
$6,707.28 for 21 years.....	140,852.88	166,906.84
10.6% fringe benefits	17,692.13	17,692.13
		$285,408.23
Medical expenses $2,285.74 554.85	2,840.59	
Future	1,000.00	3,840.59
		$289,248.82

Dated: July 12, 1967.

Noel P. Fox
District Judge

APPENDIX B

No. 18744

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Clifford Gowdy,
Plaintiff-Appellee,
v.
United States of America,
Defendant-Appellant.

Appeal from United States District Court for the Western District of Michigan.

OPINION

Decided June 20, 1969.

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

WEICK, Chief Judge. United States has appealed from a judgment of the District Court in favor of plaintiff, Gowdy, in the amount of $289,248.82, in an action for personal injuries brought under the authority of the Federal Tort Claims Act. 28 U.S.C. §§1346(b) and 2671. The opinion of the District Judge is reported in 271 F.Supp. 733 (1967).

Gowdy was a journeyman electrician employed by Whittaker Electric Company [Whittaker], an independent contractor, which had a contract with the Coast Guard to install new electrical machinery in a machinery house which was part of a lighthouse located on a breakwater on Lake Michigan. The beacon tower of the lighthouse extended

upward from a part of the flat roof of the machinery house. Entrance to the lighthouse was gained from inside the machinery house.

While operating a hand hoist or ratchet on the flat roof of the machinery house, Gowdy lost his balance and fell eleven feet to the ground, sustaining comminuted fractures of both heels. He was awarded Workmen's Compensation benefits under Michigan law as an employee of Whittaker, but sued the Government as a third-party tortfeasor.[1]

In his complaint, Gowdy alleged negligence on the part of the Government in the following respects:

1. In hiring an incompetent contractor;

2. In not exercising reasonable care in the performance of its right of control over plaintiff's employer;

3. In furnishing unsafe equipment;

4. In giving ambiguous orders to an independent contractor;

5. In failing to warn plaintiff of the dangerous condition of the lighthouse; and

6. In failing to provide a reasonably safe place to work.

The District Court found only that the Government was negligent in one particular, namely, in failing to install a guardrail around the flat roof of the machinery house so as to prevent plaintiff's fall therefrom.

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[1] The Government filed a third party complaint against Whittaker, which the District Court ordered separated from the plaintiff's action. The third party action was compromised by Whittaker's agreement to pay one-half of any judgment finally recoverable against the United States.

IS ADMIRALTY LAW APPLICABLE?

At the outset we must determine whether maritime law applies to this claim under the Federal Tort Claims Act, as was held by the District Court. 271 F.Supp. at 738.

The Federal Tort Claims Act provides a remedy on claims against the United States for—

> ". . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346 (b).

The words "law of the place" have been construed to require the application of the "whole law" of the state where the act or omission occurred. *Richards v. United States,* 369 U.S. 1, 11 (1962). This would include the state's rules on choice-of-law.

Should it be determined that the tort here involved required application of maritime law, a state court would be required to apply that law. *Hess v. United States,* 361 U.S. 314, 318 (1960). See *Ira S. Bushey & Sons, Inc. v. United States,* 276 F.Supp. 518, 524 (D.C.N.Y. 1967), *aff'd on other grounds,* 398 F.2d 167 (2d Cir. 1968).

The District Court relied upon the traditional test of the locality of the tort in determining whether maritime law must be applied. Principal reliance was placed upon *Wiper v. Great Lakes Eng'r Works,* 340 F.2d 727 (6th Cir. 1965), *cert. denied,* 382 U.S. 812, and *Hastings v. Mann,* 340 F.2d 910 (4th Cir. 1965), *cert. denied,* 380 U.S. 963.

The present case, however, is one of those "troublesome borderline cases" in which the locality test alone is not sufficient. *Chapman v. City of Grosse Pointe Farms,* 385 F.2d 962, 964-966 (6th Cir. 1967) (decided after the District Court rendered its judgment).

In view of the fact that the lighthouse was located at the end of a breakwater,[2] the Government contends that it falls within the land extension doctrine because the "accident . . . was on an unbroken extension of land," and that, therefore, there is no basis for applying admiralty law. It argues that the lighthouse was not, strictly speaking, surrounded by water.[3]

The District Court, on the other hand, noted that lighthouses are generally not encompassed within the land extension doctrine. *Hastings v. Mann, supra* at 911, and that a breakwater is distinguishable from a wharf or pier, since its purpose is to break the force of the waves. This analysis aids us no more than did the analysis of the locality test in *Chapman.* After concluding that the locality test alone would place the case within admiralty jurisdiction, this Court stated in *Chapman v. City of Grosse Pointe Farms, supra,* at 965:

> "The second question presented . . . is whether locality of the tort alone is sufficient to confer admiralty jurisdiction upon the district court. In light

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[2] The breakwater was constructed of concrete and stone supported by piles sunk into the bottom of the lake. The breakwater extended about 1000 feet west from the east shore of Lake Michigan. The machinery house rests on an elevated foundation about three feet above the breakwater.

[3] Whittaker's Superintendent Curow testified that he walked on the breakwater, out to the site, on at least two occasions. There was, however, no loading or unloading of ships on the breakwater.

> of the fact that the purpose of the constitutional provision (U.S. Const. art. III, §2) underlying section 1333 was to achieve uniformity in the area of maritime commerce . . . doubt might well exist as to whether locality alone should be the sole controlling factor in determining the existence of federal admiralty jurisdiction."

Nor is the fact that the lighthouse itself serves a maritime purpose sufficient to require in this case application of maritime law.

In *Chapman* the Court stated the following principle:

> "While the locality alone test should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the *wrong* and some maritime service, navigation or commerce on navigable waters. Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which, in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts." [Italics ours.] *Id.* at 966.

Here the "wrong," if any, involved the failure of a landowner to provide a guardrail or some type of warning for business invitees using the property. The invitees were an electrical construction company and its employees engaged in the installation of new machinery in the machinery house. The company was not a maritime con-

tractor, and its employees were not seamen, longshoremen or harbor workers.

The "wrong" bears no relationship whatever to "some maritime service, navigation or commerce on navigable waters." The application of maritime law in this case would not, therefore, serve the purpose of uniformity in the area of maritime commerce.

In view of the fact that there are no other choice-of-law problems, *e.g.*, multistate problems, we hold that Michigan substantive law is applicable to this case.

NEGLIGENCE

The accident happened in broad daylight. Gowdy was familiar with the flat roof as he had been on it a number of times before the mishap. Gowdy admitted that he knew that the roof had no guardrail and that if he was not careful he might fall. Notwithstanding all of this knowledge, the District Judge found that the absence of the guardrail "presented a deceptive and hidden danger to the Plaintiff"; that once he was "lulled into a sense of security, he could easily be lured into a position of danger"; and that it was "a subtle and alluring hazard." 271 F.Supp. at 745 and 744.

Whittaker, plaintiff's employer, who was alleged by plaintiff to be an incompetent contractor, had been regularly engaged for many years in the construction of heavy and medium industrial projects, with extensive experience with the hoisting of heavy equipment. It did an annual business of $1.5 million. It employed about one hundred persons at that time, and now has one hundred thirty employees. There was no proof that Whittaker was an incompetent contractor, or that the Government had knowledge of any

alleged incompetency. In any event, the award of contracts by the Government involves a "discretionary function or duty," in the exercise of which it is exempt from liability under the Federal Tort Claims Act. 28 U.S.C. §2671, and *Dalehite v. United States,* 346 U.S. 15, 42 (1953).

The Government was not required to exercise any supervision or control over its independent contractor and is not liable for failure to do so. The mere reservation of the right to inspect the work did not impose upon the Government any duty of inspection or control. *Grogan v. United States,* 341 F.2d 39, 43 (6th Cir. 1965). Nor is the Government liable for the negligence of the independent contractor as the Act limits liability to injuries "caused by the negligent or wrongful act or omission of any employee of the Government. . . ." *Grogan v. United States, supra.*

The Government furnished no equipment to the contractor. It did permit the contractor to use a davit for the purpose of hoisting machinery. The davit was fastened on the edge of the flat roof of the machinery house and extended to a height of about ten to twelve feet above it. There was no proof that the davit was defective or that the davit had anything to do with causing the plaintiff to lose his balance and fall from the roof.

There was no proof that the Government gave ambiguous or any other kind of orders or instructions to the contractor. Whittaker's Superintendent Curow testified:

> "Q. Did you receive any orders and instructions from anybody in the coast guard?
>
> A. Not that I can recollect, although it was visited on two occasions by representatives of the coast guard who looked the work over to see that it was done to their satisfaction.
>
> * * *

Q. Did you see any equipment that was being used for this purpose at that time?

A. I supplied the hoist with which it was to be removed, and replaced, yes.

• • •

Q. And did you ever meet with anybody from the coast guard as to how the work might proceed?

A. No, I don't recollect that the coast guard at any time gave any instructions as to this."

The fifth and sixth specifications of negligence may be considered together. The mishap did not occur on the lighthouse part of the structure. Plaintiff needed no warning to tell him that the flat roof of the machinery house had no guardrail around it as that fact was plainly visible to anyone. Nor did he need anyone to tell him that if he worked too close to the edge of the flat roof and lost his balance he might fall. As we will show below, he was not required to be on the roof in order to do the work he was performing at the time of the accident, for he could have operated the hoist from the ground level.

The contract with the coast guard required Whittaker to "provide competent superintendence" and to "take precautions necessary to protect persons or property against injury or damage."

The work was performed under the supervision of Whittaker's Superintendent, Frederick Curow, who had been employed by Whittaker for seventeen years. He had inspected the site twice in estimating the bid for the contract, and visited it every third day and some times more frequently. Curow supplied the ratchet hoist which Gowdy was using at the time of the accident. Charles Smith was the foreman in charge, and he and Gowdy did the work. It was Smith who gave Gowdy instructions as to the use of

the ratchet. The Government cannot be held liable for the failure of Whittaker's superintendent, Curow, and its foreman, Smith, to supervise the work and to give proper instructions to Gowdy as to how to use the employer's hoist.

The Government had delivered the machinery to the site and it was the function of the contractor to install it in the machinery house. In order to install the machinery in the building it was necessary to remove the metal door of the machinery house, which provided entrance at ground level. It was the job of the contractor to remove the door each morning and to replace it at the end of the work day, about four o'clock P.M. Prior to the mishap, Gowdy had done this without injury eight or ten times.

Because of the weight of the metal door, it had to be lifted by a hoist or block and tackle, and then swung in or out of place, depending on whether it was being removed or reinstalled. A hoist or block and tackle could be attached to the davit on the roof of the machinery house. Chief Bosun Mate James W. Gilligan of the Coast Guard gave permission to the contractor to use the davit.

The work of lifting the door could have been performed at safe ground level simply by attaching lengths of chain or choker to the eye of the davit. Chokers were supplied to Gowdy by his employer. Instead of attaching them to the davit, Gowdy attached the hoist ratchet itself directly to the eye of the davit. The ratchet was only about eighteen inches in length. In operating the ratchet, Gowdy reached above his head, and out, being able to grasp only about three inches of the handle. This was done while he was standing about one foot from the edge of the roof, on the balls of his feet, and leaning toward the edge. While pumping the ratchet in this stance, Gowdy lost his balance and fell. By attaching lengths of chain or a choker to the

davit, Gowdy could also have operated the ratchet on the roof but at waist level.

Gowdy testified on cross-examination as follows:

"Q. Now, who gave you instructions as to how to perform the operation that you were engaged in just prior to your injury?

A. My foreman."

Gowdy received no orders or instructions of any kind from any employee of the Government. Nor did the Coast Guard give any instructions or orders to Superintendent Curow.

In his testimony at the trial, Gowdy was unable to tell the Court just what caused him to lose his balance and fall. His foreman, Smith, who was present, did not see him fall.

On direct examination, Gowdy testified:

"Q. And would you tell the Court exactly what happened as best you remember it?

A. I don't actually remember. The only thing I do remember is trying to catch my balance of getting back on the roof. I was started out [sic] and I remember how you wave your hands—In other words, try to get your body back, and I couldn't get back And the next thing I remember, I lit down beside Chuck.

Q. And on the lower level?

A. On the lower level."

On cross-examination he testified:

"Q. Can you give us any more specific details as to what you recall during the last few seconds and fractions of a second before you had the realization that you were losing your balance?

A. All I can remember that I was trying to catch my balance. I was trying to get back on this roof or platform. I was attempting to.

Q. But at this time you were already in the process of falling?

A. I had already lost my balance.

Q. And you were in the process of falling?

A. I hadn't left it yet. I mean, I hadn't left that platform yet.

Q. But you were on your way, though?

A. Yes, I guess I was on my way.

Q. Right. Just before you had that sense of losing your balance, what do you remember about those few seconds or few fractions of a second?

A. I don't remember nothing. In other words, I have no recollection of—

Q. Did someone push you?

A. Nobody pushed me, no.

Q. Did you black out, or lose consciousness?

A. No.

Q. You have absolutely no memory whatsoever of the—just the last few fractions of a second before you had this sensation of losing your balance?

A. The only recollection that I have, that I was trying to get back on that roof.

Q. But before that time it's just—

A. Before that time I was working the hoist up to that time I lost my balance; I have no recollection of what happened. I don't know."

Since Gowdy did not know what caused him to lose his balance and fall, there would seem to be no basis to speculate that it was the negligence of employees of the Government, rather than the negligence of Gowdy or of the con-

tractor, in giving improper instructions or in failing to properly supervise the work of its employees.

It was not the function of the Government to instruct the contractor's employee, Gowdy, how to use the ratchet hoist. Nor did the Government incur liability by not having personnel present during the course of construction to make sure that the contractor's employees were properly using the contractor's equipment. Bosun Mate Gilligan testified that on occasions when he was out at the site, "they had a hoist hanging but I don't recall what it looked like. I didn't pay that much attention to it. . . . I don't remember whether the ratchet was attached, if it was up at the ring or arms-level. . . . Some part of it was hooked to the top of the davit, yes."

The evidence of knowledge on the part of the Government that Whittaker's employees were using the flat roof of the machinery house as a work area is quite sketchy. Gilligan, who was called as a witness by plaintiff, testified:

> "Q. And did you, in the course of this work, see employees engaged in the performance of the Whittaker contract working at the second level, or moving up from the lower level to a higher level involving the second level?
>
> A. I don't know. When I was out there, I generally went out and talked to the foreman. I didn't pay much attention when I walked in where one guy was standing or the other one. I probably seen them up there. Maybe I did or didn't; I don't recall."

We would doubt that this kind of evidence, offered by the party who has the burden of proof, would qualify even under the scintilla rule.

The District Judge applied Michigan substantive law on the issue of negligence. In view of our holding that admiralty law does not apply to this case, we also apply Michigan law to the substantive issues involved here.

To support the finding of negligence, the District Judge relied on *Ackerberg v. Muskegon Osteopathic Hospital*, 366 Mich. 596, 115 N.W.2d 290 (1962), which involved only the question of whether the trial court erred in directing a verdict in favor of defendant at the close of plaintiff's evidence. In *Ackerberg* the plaintiff fell from a platform which was elevated from two to three feet above the ground. This platform led to the emergency entrance which in turn led to the emergency room of the hospital, and was used by the public in entering and leaving the hospital. Plaintiff testified that because of a strong odor in the emergency room and the injury to his child, he became nauseated and a little dizzy. Feeling the need of fresh air, he walked out through the emergency entrance on to the rear platform, where he fell to the ground. The Court stated:

> "The test, then, in the instant case is, would all reasonable men agree as to whether or not defendant hospital had a duty to construct a guard or protection around the rear platform which was used by the general public entering and leaving the emergency entrance of the hospital in an excited state.
>
> "The declaration alleges that defendant hospital knew or ought to have known that people using the emergency entrance would be under the strain of physical and emotional shock and, in the exercise of reasonable care, should have provided a guard of some type on this platform.

> "We think when situations such as this arise, considering the attendant excitement and the mental and emotional condition of the individuals entering and leaving an emergency entrance to a hospital, reasonable men might differ as to whether or not there was a necessity for the construction of a guard rail to protect those on or about the platform as business invitees." *Id.* at 601.

Gowdy's attention to his work certainly does not raise the same inability to protect himself from obvious danger as the emotional and mental excitement involved in *Ackerberg*, where the plaintiff's ability to perceive the danger may have been limited by the circumstances. No one pushed Gowdy. Although he could not remember what happened, he did not black out or lose consciousness prior to the fall. He simply lost his balance and fell from the roof.

In *Ackerberg* the Court further said at page 602:

> "We do not decide in this case that plaintiff is entitled to recovery, but merely that there is a question of fact as to defendant's negligence which should be submitted to a jury."

Our case does not involve any question as to whether the Court should or should not have directed a verdict, or should have granted or refused to grant a motion to dismiss. The question here is whether under Rule 52(a) of the Federal Rules of Civil Procedure the finding of the District Judge that the Government was negligent is clearly erroneous.

In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), the Court held:

> "A finding [of fact] is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In Wright on Federal Courts, the author says at page 377:

> "In a non-jury case the appellate court can reject inferences which it deems clearly erroneous and can reverse a finding, though supported by substantial evidence, if the court is convinced on the whole record that the finding does not reflect the truth and right of the case." Citing *Sanders v. Leech,* 158 F.2d 486 487 (5th Cir. 1946); *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948).

Assuming that the correct legal standard has been applied, the "clearly erroneous" test is applicable to a finding of negligence. Wright, *supra* at 376, citing *McAllister v. United States,* 348 U.S. 19 (1954).

The District Judge also relied on *McCord v. United States Gypsum Co.,* 5 Mich.App. 126, 145 N.W.2d 841 (1966), and said it was similar to our case since he found that "the absence of a guardrail presented a deceptive and hidden danger to the plaintiff." 271 F.Supp. at 745. We find no similarity in the facts of the cases. In *McCord,* plaintiff was working on a roof and fell through a skylight. He presented evidence tending to prove that the skylight was covered with dust and dirt and that the skylight was built into the roof so that it appeared to be a part of the roof and he could not see it. The Court held that this presented a factual question as to whether plaintiff was entitled to a warning of the dangerous condition, in the absence of which warning defendant was liable for his in-

juries. By contrast, the present case involves a "known and obvious danger." See 2 Restatement of Torts, Second, §343A. Gowdy admitted that he knew there were no guardrails on this flat roof.

Suppose a home owner contracts with a television supplier to erect an aerial on the roof of his house. The roof is a slanting roof, on which it is even less safe to work than a flat roof. The homeowner has no guardrails around the roof of his home. A repairman, employed by the supplier, while working on the rooftop loses his balance and falls to the ground, sustaining personal injuries. Is the homeowner liable (1) for not having guardrails around his roof so as to prevent the repairman from falling, or (2) for failure to warn the serviceman of a fact that he already knew, namely, that there were no guardrails? We say, "No."

The District Court, we think, was unduly impressed by the testimony of two former employees of the Government, who testified for the plaintiff as safety experts. They testified that the Government's failure to maintain guardrails around the roof created an undue risk which could not reasonably be guarded against by a workman on the roof, because he might become engrossed in his work and forget about the danger. Guardrails had been on the roof originally, but over the years they disintegrated and were removed.

The only inference which may reasonably be drawn from the evidence is that the davit had been used by the Coast Guard for the purpose of loading or unloading equipment or supplies, and that it might be necessary either to get up on the roof or to use a ladder to attach a block and tackle to the davit or to inspect or oil the davit. There was no proof that the Coast Guard even used the roof as a work area, or authorized the contractor to make such use of it. The roof was never used to enter the lighthouse.

It is clear that it was not necessary for Gowdy to operate the ratchet hoist from the roof level for he could have operated it safely from the ground. Nor was it necessary for Gowdy to place himself in what was at best a precarious position in which to operate the ratchet. Plaintiff's expert witnesses apparently did not consider the fact that it was unnecessary for Gowdy to perform the work he was doing from the roof level.

The District Judge was of the view from the testimony of the experts that the Government had knowledge in the field of safety engineering "unquestionably" superior to that of Gowdy or Whittaker and therefore it owed a higher duty for the protection of Whittaker's employees. He stated:

> "If the second deck of the lighthouse were not a working platform, and if the defendant in this case were a typical landowner unaware of the sophisticated nuances of safety engineering, we might probably agree that defendant discharged its duties to plaintiff." 271 F.Supp. at 740.

In the first place the wisdom of Gowdy's use of the flat roof as a working platform may well be questioned. It was necessary for him to be on the roof only to attach the hoist to the davit. Gowdy made the attachment without injury to himself. It was not necessary for him to operate the hoist from the roof top, as he could have operated it safely from ground level.

The mere fact that the Government may have had superior knowledge of safety standards did not increase its duty to exercise ordinary care. The Government was not performing the work, and Gowdy was not under its supervision or control. The District Court did not feel that it was doing anything other than determining the Govern-

ment's superior knowledge of the danger here involved. 271 F.Supp. at 746. As before stated, the Government owed no duty of inspection and control of the operations of the independent contractor.

We do not believe expert testimony was needed to prove that one working on the edge of an elevated platform could be distracted and fall. Clearly, the question of whether it was foreseeable for a workman to be distracted and fall is within the competence of an ordinary layman.

> "To warrant the use of expert testimony . . . the subject of inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman. . . ." McCormick, Law of Evidence 28; *Cohen v. Western Hotels, Inc.*, 276 F.2d 26, 27 (9th Cir. 1960); and *Henkel v. Varner*, 138 F.2d 934 (D.C. Cir., 1943).

We hold that in this case the knowledge of safety standards on the part of the Government did not impose on it any greater duty than was applicable to a private person, particularly where, as here, such duty depends upon the foreseeability of another's failure to protect himself from a known and obvious danger.

The District Court characterized the hazard as "subtle and alluring," but this characterization does not withstand analysis. As noted above, Gowdy testified that he was aware of the fact that if he were not careful he would fall.

Reliance by the Court upon the Government's expertise in this case may in effect make the Government an insurer of the safety of all who use its premises for business purposes under circumstances where private persons would not be liable. Michigan recognizes that "'[t]he occupier is not an insurer of the safety of invitees. . . .'" *Kroll v. Katz*, 374 Mich. 364, 373, 132 N.W.2d 27 (1965), quoting

Prosser, Law of Torts 459 (2d ed.). The Act limits the liability of the Government to that of a "private person." *Mider v. United States*, 322 F.2d 193, 197 (6th Cir. 1963).

In our judgment, a flat roof without guardrails around it is not a dangerous instrumentality so as to impose absolute liability on a property owner because of his ownership thereof. But even if the roof in the present case were considered dangerous, the Government would not be liable under the Federal Tort Claims Act merely because it owned dangerous property. The Supreme Court so held in *Dalehite v. United States*, 346 U.S. 15, wherein it said:

> "But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra-hazardous' activity." *Id.* at 45.

While plaintiff points to later Supreme Court decisions[4] which he claims place in doubt some aspects of *Dalehite* with respect to negligence at the operational level, no authority is cited which jeopardizes the thrust of the principle that the Government cannot be held liable on a theory of absolute liability on account of mere ownership of dangerous property.

This Court has recognized that the Government may not be held liable without fault in *United States v. Taylor*, 236 F.2d 649, 653 (6th Cir. 1956). See *Mahoney v. United States*, 220 F.Supp. 823 (D.C. Tenn. 1963), *aff'd*, 339 F.2d 605 (6th Cir. 1964); *United States v. Page*, 350 F.2d 28 (10th Cir. 1965), *cert. denied*, 382 U.S. 979; and Prosser, Law of Torts, 1000-1001 (3rd ed. 1964).

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[4] *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957).

Since the Government may not be held liable without fault, it follows that the only basis for liability is negligence, if any, of Government employees in failing to warn Gowdy of the danger or in failing to provide guardrails to prevent the fall. But the Government was not required to warn Gowdy of something which he admitted that he already knew, namely, that no guardrail was on the flat roof and that it was dangerous for him to work too close to the edge of the roof because he might lose his balance and fall. Neither was the Government, under such circumstances, required to provide a guardrail. Thus, we hold that the Government, as the owner of this flat roof, could not have anticipated that a reasonably careful workman would not protect himself from the known and obvious danger here involved.

We conclude from consideration of the record as a whole that a mistake has been made and the finding of the District Judge that the Government was negligent is clearly erroneous. *United States v. United States Gypsum Co., supra.*

CONTRIBUTORY NEGLIGENCE

As to contributory negligence, the District Court stated:

> "Defendant's claim that plaintiff was guilty of contributory negligence is unfounded. From the testimony of defendant's former safety experts, we conclude that the attention of a reasonable and prudent workman, such as plaintiff, while working on the second deck of the lighthouse, would be concentrated almost exclusively on his work effort and that lulled into a sense of security, he could easily be lured into a position of danger." 271 F.Supp. at 745.

We disagree. Although this statement has some emotional appeal, it will not withstand analysis. While a landowner might under some circumstances foresee harm to a man on this platform, the issue here is whether under the circumstances Gowdy's behavior was reasonable. The only distraction involved here is that caused by the manner in which Gowdy operated the ratchet.

There are Michigan cases finding jury issues of contributory negligence, *e.g., Clark v. Dalman,* 379 Mich. 251, 150 N.W.2d 755 (1967); *Dockham v. Marr,* 373 Mich. 680, 130 N.W.2d 824 (1964); and *Ackerberg v. Muskegon Osteopathic Hospital, supra.* However, none of these cases involves so obvious a danger with no substantial countervailing evidence of deception or distraction as in the present case.

The rule is stated in *DeGrave v. Engle,* 328 Mich. 565, 569, 44 N.W.2d 181, 183 (1950):

> " 'Normal persons must exercise their faculties for their own protection in order to avoid injury and must make reasonable use of their sight, hearing and intelligence to discover dangerous situations which may be presented,' " quoting from *Dahlerup v. Grand Trunk Western R.R.,* 319 Mich. 96 at 100-101.

As noted above, we reject the District Court's finding that the danger involved here was more apparent to the United States through its expertise than it was to Gowdy and his employer. It clearly appears that this work could have been done in a manner which would have avoided the injury, e.g., by attaching the hoist-ratchet so that it could have been used at ground level, or even at waist level. Thus, we are not faced with a situation involving no alternative.

As aptly stated in *Jones v. Michigan Racing Ass'n*, 346 Mich. 648, 654, 78 N.W.2d 566, 570 (1956):

> "If defendant was guilty of negligence in ignoring the existence of a condition of which it knew or should have known and which it should have foreseen would be dangerous to invitees, then plaintiff, who should have seen, as he did, and been aware, as he was, of its existence and have known, as he said he did, that it was dangerous, was equally guilty of contributory negligence for having ignored it and acting . . . in disregard of that danger."

One is not required to pay exclusive attention to those features of his surroundings which involve risk of injury. One may allow his attention to be diverted; but whether or not he is justified in so doing depends on the circumstances of the case. See 2 Restatement of Torts, Second, 45. In view of the facts that the danger was obvious and that Gowdy recognized its existence, we hold that the finding of the District Court that Gowdy was not negligent is clearly erroneous.

Nothing in recent Michigan cases forecloses a finding of contributory negligence. *Dockham v. Marr, supra, Jones v. Michigan Racing Assn, supra*, and *Honorl v. J. L. Hudson Co.*, 10 Mich. App. 623, 160 N.W.2d 513 (1968), and this case clearly falls into that category. This contributory negligence bars plaintiff's recovery under Michigan law. *Jones v. Michigan Racing Ass'n, supra* and *Honorl v. J. L. Hudson Co., supra.*

We need not determine whether Gowdy was contributorily negligent as a matter of law. We hold only that the finding of the District Court that Gowdy was not negligent is clearly erroneous.

The Government further contends that the award of damages in the amount of $289,248.82 for comminuted fractures of the heels, "made to a claimant able to walk, drive a car, and engage in sedentary employment, and under no substantial regime of pain medication" is grossly excessive, and that the District Court applied the wrong measure of damages.

In view of our holding with respect to the issues of negligence and contributory negligence, we need not consider the issue of damages, or the rules adopted by the District Judge in his opinion on damages.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

EDWARDS, Circuit Judge, concurring. I concur in the result reached by the court and join that portion of the opinion which holds this record shows no actionable negligence under the terms of the Federal Tort Claims Act, 28 U.S.C. §1346(b) (1964).

APPENDIX C

CHART OF LIABILITY WHERE PRINCIPAL UNDERTAKES WORK THROUGH INDEPENDENT CONTRACTOR

I.	II.	III.
Liability for Principal's Own Negligence	*Liability for Affirmative Non-Delegable Duty Violations and Vicarious Liability*	*Immunity From Affirmative Non-Delegable Liability and Vicarious Liability*
The principal is liable for any lack of due care on his part. Examples of the negligent acts of the principal for which he may be liable:	The principal is liable vicariously and for affirmative care violations when:	There is immunity from vicarious liability if all of the following exist:
1. The furnishing of a site which he knows or should know in the exercise of due care is unsafe. (A warning may or may not be enough)	1. The work is inherently hazardous,	1. The work is not inherently hazardous.
	or	
2. The furnishing of unsafe equipment which he knows or should know in the exercise of due care is unsafe.	2. The principal retains the right of control,	2. A competent contractor has been employed.
	or	
3. The negligent failure to make proper regulations or the giving of ambiguous orders.	3. The principal exercises control,	3. The principal retains no right of control.
	or	
4. The negligent performance of any affirmative acts gratuitously or for a consideration undertaken by the principal.	4. An incompetent contractor is employed,	4. The principal exercises no control.
5. Reckless misconduct.	*unless*	*unless*
6. Violation of statutory duties.	The legislature by statute has in a constitutional manner granted immunity from such liability.	The legislature by statute has required non-delegable duties of the principal.
7. Violation of other non-delegable duties (Section II).		

MISCELLANEOUS POSSIBLE CONSIDERATIONS

A) The principal by contract with the independent contractor may not limit his liability to third persons.

B) Contributory negligence may or may not be a defense.

C) Assumption of the risk may be a defense remaining in some jurisdictions.

D) The defense of statutory employer in some jurisdictions may be unconstitutional in that there is an unreasonable classification in either those immune or those who may sue, or there may be a taking of property without due process.

E) The duty is owed to everyone who might reasonably, foreseeably be injured by lack of due care.

F) The duty owed is due care (due care includes the concept of reasonably safe place to work for employees on the site).